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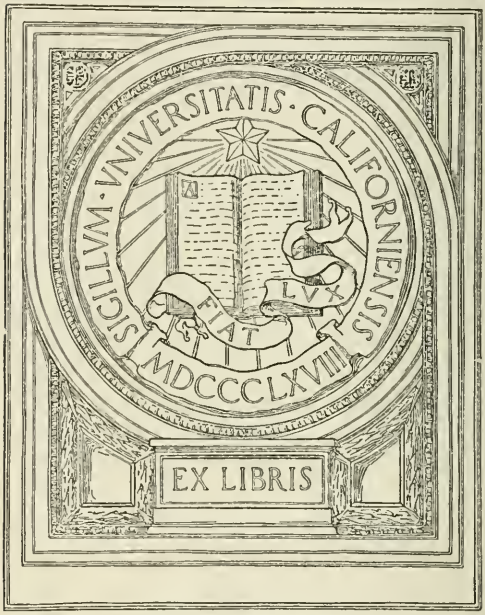

UNFAIR COMPETITION

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UNFAIR COMPETITION

A Study of Certain Practices

With Some Reference to the Trust Problem in the United States of America

By

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TO

PROFESSOR JAMES C. EGBERT

OF

COLUMBIA UNIVERSITY

WITH PLEASANT RECOLLECTIONS OF MY EXPERIENCE IN ADMINISTRATIVE WORK AS HIS SUBORDINATE

Sacher. 1.28-1921

PREFACE

This little volume owes its inception to Professor E. S. Mead, of the University of Pennsylvania. During the academic year 1911–12, while teaching and studying at the Wharton School, it was my privilege to be one of the two students in a seminar on trusts and combinations conducted by Professor Mead. One of the topics assigned to me in the course of the year was unfair competition, and a number of antitrust petitions contained in Professor Mead's personal library, together with some two or three records in antitrust suits, supplied the data for my report. During the latter part of the same academic year, in connection with the editing of my *Industrial Combinations and Trusts*, I collected further material illustrating unfair competitive practices, some examples of which I embodied in that volume in the chapter on trust methods.

For something over a year I did nothing further in connection with the subject of unfair competition except occasionally to add to the data which I already possessed relating to this

topic. Impressed with the necessity of the prohibition and elimination of these methods and practices, however, I began, in the fall of 1913, a study of this subject, which was completed early in the year 1914. This study, declined by one economic periodical, was finally published by the *Political Science Quarterly*, having been divided into two articles, of which the first appeared in June and the second in September, 1914. In these two articles I pleaded the necessity of the prohibition of unfair competition and expressed the view that no satisfactory solution of the trust problem could be arrived at without the elimination of practices of this character.

These two articles, appearing at about the time that the unfair-competition section of the Trade Commission Act was under discussion, figured somewhat in the congressional debates and, I am glad to say, seem to have been of some slight assistance in causing the retention of that section in the law which was ultimately passed.

Within the months following the publication of these articles by the *Political Science Quarterly* I obtained a considerable amount of material which I had been unable previously to secure. This led to a decision to revise and

enlarge the articles and to publish the same in book form, on the theory that a more or less complete discussion of the entire subject from an economic point of view might prove valuable to many persons if it were available outside the economic periodicals. In the course of the revision the major portion of the original articles was entirely rewritten, and numerous additions were made, so that in its present form the study is more than twice its original size. It may, I hope, justify itself by proving of both interest and value to a number of readers.

Certain points, however, should be held in mind in perusing the volume. So far as possible the work has utilized actual testimony in illustrating various methods. A considerable proportion of this testimony is from court proceedings and was given under oath. At the same time it should be remembered that even sworn testimony must be utilized with discrimination and that in some cases it may not be entirely accurate. Whenever possible the writer has noted other testimony tending to prove either the truth or the reverse of the testimony quoted or cited. All statements based upon petitions, indictments, briefs, etc. (except when reproducing testimony, exhibits,

or other data), are necessarily founded merely upon allegations.

I wish to acknowledge the courtesy of the *Political Science Quarterly* in permitting the utilization in this volume of my original articles on this subject. The same acknowledgment is due to *The Annals* for the privilege of using material from an article entitled "Unfair Methods of Competition and Their Prevention," which appeared in January, 1916. I also wish to express the obligation I am under to Mr. O. J. Field, former chief clerk of the Department of Justice, and especially to Mr. C. E. Stewart, the present chief clerk, for their courtesy in assisting me in every possible way. Both of these gentlemen have given much time to the answering of my numerous requests for information during the last four or five years and have placed at my disposal material which it would have been next to impossible otherwise to have obtained.

I also desire to express my sense of obligation to William T. Chantland, M. Q. Macdonald, A. F. Busick, Frank Jones, and H. V. Amberg, of the staff of the Federal Trade Commission. While the views herein expressed are entirely personal ones, and are not necessarily in agreement with those of any or all of

these gentlemen, the fact remains that each of them has given me many valuable suggestions, and their contributions to the volume both directly and indirectly have been considerable.

Finally, I am greatly indebted to my dear friend Professor W. W. Pierson, of the University of North Carolina, formerly my colleague at Columbia. Professor Pierson read the original typewritten manuscript and radically revised considerable portions thereof, in addition to making a number of most valuable suggestions. The volume owes much to him, and the assistance of his discriminating and critical mind has been invaluable. It is, of course, needless to add that Professor Pierson is in no sense of the word responsible for any of the errors or omissions of the volume.

W. H. S. STEVENS

NEW ORLEANS, LA.
June 1, 1916

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INTRODUCTION

Section V of the Federal Trade Commission Act reads as follows:

> That unfair methods of competition in commerce are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers, subject to the acts to regulate commerce, from using unfair methods of competition in commerce.

Around this section centered much of the debate on the trust legislation of the Wilson administration. This was not unnatural. The term "unfair competition" is very difficult to define, and it is scarcely less difficult to explain. Congressmen and senators were no more clear as to its meaning than were outside individuals. Several legislators favored the enumeration and prohibition of certain specific practices. These in consequence opposed the general inclusive prohibition of unfair methods of competition as lacking definiteness. The subject was canvassed pro and con, but ultimately the supporters of the general prohibition won and the disputed section remained in the Trade

Commission Act as finally passed by the Senate and the House.[1]

In endeavoring to determine the meaning and significance of unfair competition it is perhaps best to consider, first, what may be designated as the older signification of the term. For many years the words "unfair competition" have been frequently used by the courts and have had a fairly well-established meaning in the law. In addition there have appeared several legal treatises entitled *Unfair Competition.* But it is to be noted that, until comparatively recent years, both the courts and the legal profession have given to this term a relatively narrow construction. To realize this fact it is only necessary for one to consult the definitions of unfair competition to be found in the legal encyclopedias and dictionaries. Thus in the *Cyclopedia of Law and Procedure* we find the term defined as—

> passing off or attempting to pass off, upon the public, the goods or business of one person as and for the goods or business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to

[1] For an analysis and criticism of the Wilson trust legislation, together with a brief sketch of legislative history of the two laws, cf. W. H. S. Stevens, "The Federal Trade Commission Act," *American Economic Review,* IV (December, 1914), 840, and "The Clayton Act," *ibid.,* V (March, 1915), 38.

that effect. . . . . The basic principle is that no one has a right to dress up his goods or otherwise represent them in such a manner as to deceive an intending purchaser and induce him to believe he is buying the goods of another.[1]

Similarly, the legal text writers will be found to devote their attention almost wholly to practices either of this or of a like character.

Until recent years, therefore, the term "unfair competition" has referred primarily to the marketing of goods by methods involving fraud, misrepresentation, etc.[2]

[1] *Cyclopedia of Law and Procedure*, xxxviii, 756–58.

[2] Specific exceptions to this rule may of course be found in the cases. Thus the courts have sometimes upheld or enjoined other practices than those which would be comprehended in the foregoing definition (cf. *Report of the Commissioner of Corporations, Trust Laws, and Unfair Competition*, chaps. vii, viii). In some such cases these methods have been specifically declared to be either unfair or fair competition, but in many instances the decision which has been rendered has been based, not upon the fairness or unfairness of the method involved, but upon some other question, such as whether the practice involved or constituted restraint of trade, or monopoly. A fairly good illustration of this point is *Whitwell* v. *Continental Tobacco Company*, where the court declined to hold void under the Sherman Act a rebating scheme designed to secure exclusive selling (cf. *infra*, chap. vii). It ought perhaps to be added that it does not follow because of this decision that such an arrangement is not unfair competition, nor that it will not be so regarded under the provisions of the new law. Some of the later legal text writers also consider unfair competition from a broader standpoint than that of the definition above. Thus Nims (*Unfair Business Competition*) devotes considerable space to a discussion of interference with competitors, contracts, etc. (cf. *infra*, chap. xi). Giving due weight to these specific exceptions, however, the writer is inclined to believe that it is none the

Now, it is by no means unlikely that the term "unfair methods of competition" as used in the Trade Commission Act may and will be so construed as to embrace unfair competition in the older signification which has been discussed. But it can scarcely be said that it was primarily for the purpose of preventing such acts that section 5 of the Trade Commission Law was enacted. All the practices embraced within the meaning of unfair competition in the older sense have been repeatedly before the courts. For years, almost centuries, equity, both in England and in the United States, has stepped in to enjoin these methods, so that the law of unfair competition in the older legal sense of the term is fairly well established. To prevent such practices, therefore, legislation was scarcely necessary. At the same time there exist numerous methods which, while not usually involving fraud, misrepresentation, etc.,[1] are none the less a most serious economic evil. Primarily it may be said that the unfair-competition section of the Trade Commission Act was directed against these practices. It was intended to prohibit and prevent

less correct to say that up to a comparatively recent date the meaning of the term "unfair competition" was that of "passing off," or "misrepresentation," as stated in the definition above.

[1] Except perhaps in the case of bogus independent concerns.

those classes of acts which, for want of a better term, may be described as economically unfair.

To understand clearly the nature of such practices, it is necessary for one to comprehend what is involved in economically fair competition. In an economic sense fair competition signifies a competition of economic or productive efficiency. In other words, an organization is entitled to remain in business as long as its production and/or selling costs enable it to compete in a free and open market. As the productive and selling efficiency of one or more competing concerns in any line of business increases beyond that of others, the price of the goods sold tends correspondingly to decline. The more efficient organizations reduce the price in an endeavor to increase their volume of sales, expecting more than to compensate for the decreased profit per unit by the larger number of units sold. Generally, marginal concerns will gradually lose their market. Ultimately, if unable to reduce or hold their costs below the market price, they will be compelled to discontinue business.[1]

[1] This is the theory of fair competition upon which has been constructed what may be termed the competition theory of monopoly. In its essence this theory is that the logical result of the competitive process is the concentration of the business in the hands of one organization, or, at most, a very few. The soundness of this theory will be discussed later in detail.

To the individual organization which chances thus to be eliminated the result of the process undoubtedly appears extremely harsh. Yet as long as competition continues to be regarded as an economically sound principle, as long at society accepts and countenances it, there can scarcely be said to be either unfairness or injustice involved in the results which it logically brings to pass, i.e., the elimination of inefficient organizations. The justification of the principle of competition must always be found in the benefits which its operation confers upon society. The interests of society lie in the highest possible utility at the lowest possible cost.[1] In essence this simply means that society is interested in procuring at the lowest possible prices those goods best adapted to the satisfaction of its wants, since, generally speaking, the lower the price the less the total labor-pain cost of acquisition and the larger the total surplus of satisfactions which society obtains. To secure this result it is necessary that efficient units of organization shall be preserved; and it is equally desirable that inefficient units shall be destroyed. The latter constitute an unne-

[1] Cf. Robert Liefmann, "Monopoly or Competition as the Basis of a Government Trust Policy," *Quarterly Journal of Economics*, XXIX (February, 1915), 311.

cessary burden to society, and no economic justification for their existence can be found. Economically fair competition brings to pass both results. Under its operation every organization has an opportunity to survive and continue in business which is conditioned solely upon productive and/or selling efficiency, and only those units which are lacking in these qualities are eliminated.

Unfortunately competition has not always been so conducted that the logical results of the competitive process have appeared. Efficient concerns have by no means always survived. All too frequently they have been destroyed, not by superior efficiency, but by methods against which their own efficiency afforded little or no protection. Again and again methods and practices have been employed which destroy the freedom of the market, which restrict and hamper the efficiency of other units, and which prevent potential competitors from becoming actual rivals. Such artificial arrangements are clearly unjustifiable from an economic standpoint. As already indicated, the essence of fair competition is the preservation of the efficient and the destruction of the inefficient. Where unfair methods are used, the normal consequences of the operation of

the principle of competition may be reversed. The efficient are frequently destroyed and the inefficient not infrequently preserved. The use of such practices has therefore no economic justification, and, in consequence, all methods of this character must be regarded as unfair. In other words, so far as competitive business is concerned, the final test of the fairness of a given method should be whether or not it restricts actually, or potentially, the normal operation of the law of competition with the resulting survival of efficiency. Any method used in competition which hinders or prevents the normal results ensuing from the free operation of the competitive principle must be adjudged unfair.[1]

Occasional instances of the use of economically unfair competition are found in the history of small and relatively unimportant organizations. But it is at once interesting and significant that in perhaps the majority of cases the greatest development and diversification of such methods have been attained by the most highly monopolistic organizations. While

[1] The reader should clearly understand that this discussion has no reference to the legality or illegality of various methods of competition. That is a matter for the decision of the Trade Commission and the courts. This volume attempts merely to show the economic basis for regarding certain methods as unfair.

such methods are not always easy of classification, it is still possible, by selecting what appear to be their most fundamental characteristics, to distinguish the following twelve classes of "unfair methods of competition":

I. Local price-cutting.
II. Operation of bogus independent concerns.
III. Fighting instruments.
IV. Conditional requirements.
V. Exclusive arrangements.
VI. Black lists, boycotts, white lists, etc.
VII. Rebates and preferential arrangements.
VIII. Engrossing machinery, or goods used in the manufacturing process.
IX. Espionage.
X. Coercion, threats, intimidation, etc.
XI. Interference.
XII. Manipulation.[1]

[1] These twelve forms of competition are not always so clearly distinguishable one from another that exact differentiation is possible. Occasionally one method so overlaps another, or one so supplements another, that it could be discussed equally well under either of two classes. When this occurs, the difficulty of accurate classification is increased. The writer's allocation, therefore, may not always be regarded as satisfactory. It has been attempted, however, in all cases to describe each form of competition in such a manner as to show the close connection which sometimes subsists between a given method and practices elsewhere treated.

CHAPTER I

LOCAL PRICE-CUTTING

Local price-cutting has been a frequent and familiar weapon of certain trusts. As here used, the term refers to the practice pursued by some organizations of cutting the prices of their products to a point below the cost of production in one or more of those localities in which competition exists. The loss entailed is usually recouped by the profits derived through the high prices charged in those regions where competition is either insignificant or non-existent.[1] This method has been utilized repeatedly by large and powerful organizations. The ultimate outcome[2] in such cases, with but

[1] A sectional discrimination of this character may sometimes be regarded as unfair even though prices are not cut to a point below the cost of production.

[2] A story related by Clark illustrates admirably the situation under local price-cutting: "A producer . . . . once called on the manager of the trust that was driving him to the wall, and was received with a brusque admonition that he had 'better get out of business.' 'But, do you not see,' said the independent producer, 'that, in my territory, I can produce more cheaply than you can?' 'Do you not see,' was the reply, 'that, if we lose money in the twenty cities where you are operating, and make money in two hundred other cities where we are operating, we come out ahead?'"—J. B. and J. M. Clark, *The Control of Trusts*, pp. 34–35.

few exceptions, has been the destruction and elimination of competition in those regions where this practice has been employed.

Probably the best examples of the operation and effects of local price-cutting are to be found in the histories of the old Oil and Powder trusts. In the case of the former organization, the prices charged in various localities appear to have been governed rather definitely by the percentage of competition to be met in each section. Wilhoit testified in the Missouri Standard Oil case that in his experience the Waters-Pierce Oil Company or Standard Oil Company based "their prices in a locality on their nearest competitor, or upon the presence or absence of competition. When there was competition prices would be lower, and increase with the distance from competition."[1] An examination of the tables of prices, profits, and percentages of competition presented in the brief for the United States in the suit against the Standard Oil Company confirms this testimony and indicates that the prices and profits on oil as between various localities were roughly high or low according as the percentages of competition were low or high. On October 15, 1904,

[1] Abstract of testimony of E. M. Wilhoit, *State ex. inf. Hadley, Attorney-General* v. *Standard Oil Company*, 218 Mo. 1; cf. 129.

the Standard Oil Company's profits and losses on water-white illuminating oil ranged from as high as 6.48 cents per gallon profit in Albuquerque, New Mexico, with 7 per cent of competition,[1] and 6.1 cents per gallon profit in Spokane, with no competition, to as low as

[1] The following table indicates these variations more fully. It is made up by selecting a considerable number of cities from the tables in the brief for the United States in *Standard Oil Company* v. *United States*, Supreme Court of the United States, Vol. II, pp. 432–36. (These tables are reproduced in full in W. H. S. Stevens, *Industrial Combinations and Trusts*). It is to be noted, however, that this table shows a somewhat closer relationship between prices and profits on the one hand and competition on the other than would appear in case the complete tables were reproduced.

City	State	Price in Cents Per Gallon	Margin in Cents Per Gallon	Percentage of Competition
Albuquerque	New Mexico	23	6.48	7
Spokane	Washington	21.5	6.10	0
Salt Lake City	Utah	20	4.09	0.8
Seattle	Washington	15.5	4.17	0
Fargo	North Dakota	13.5	2.10	0
Sacramento	California	13	2.45	0
Columbia	South Carolina	13	2.27	0
Nashville	Tennessee	12	2.11	0
Portland	Maine	11.5	2.34	0
Boston	Massachusetts	11	2.82	11.3
New York	New York	10.98	2.31	8.6
Harrisburg	Pennsylvania	10.5	2.47	10.3
Omaha	Nebraska	10	0.41	21.7
Wichita	Kansas	10	0.48	32.1
Columbus	Ohio	9.5	1.72	2.3
New Orleans	Louisiana	9.5	−1.35	51.2
Pittsburgh	Pennsylvania	8.5	0.87	32.8
Chicago	Illinois	8.5	0.56	12.7
Duluth	Minnesota	8.5	−0.88	9.9
Louisville	Kentucky	8.5	−0.38	16.1
Richmond	Virginia	8	−0.27	12.0
Los Angeles	California	7	−3.16	33.4
Cincinnati	Ohio	7	−1.09	45.3

For scores of specific instances of local price-cutting by the old Standard Oil Company cf. brief *cit. supra*, Vol. II, pp. 428–500.

3.16 cents per gallon loss in Los Angeles with 33.4 per cent of competition and 1.35 cents per gallon loss in New Orleans with 51.2 per cent of competition.

The history of the development of the various combinations in the explosives business is in some respects merely a record of local price-cutting and its results. Each campaign of this character which was undertaken was speedily followed by the acquisition of the concerns attacked and by new articles of association whereby such organizations became parties to the new combination.[1] In many, if not the majority of, cases, a new company producing explosives was given practically no chance whatever of surviving. In the contest against the King's Great Western Powder Company, for example, instructions were given by the Hazard Powder Company to its agents *to cut the price with the guaranty to consumers that the cut price would be ten cents lower than any price which the King's Company would make to them.* As a result the price of rifle powder in Cincinnati, where the King's Company was located, declined to $2.25 per keg, with some sales at $2.15 and $2.10, although

[1] Cf. W. H. S. Stevens, "The Powder Trust," *Quarterly Journal of Economics*, XXVI (May, 1912), pp. 447 ff.

in the New England states, the eastern seaboard, and the extreme western states it sold at the full list price of $6.25 per keg. Similarly, the price of blasting powder receded from $2.75 or $2.85 to 80 cents per keg in carload lots, though prices were fully maintained in the non-contested districts.[1]

In its operations against the Birmingham Powder Company a few years later, the Powder Trust set a price of 70 cents per keg on powder f.o.b. Birmingham, and added to this price the freight rates from that point to the markets which it wished to reach. The results were not long delayed. As one of the persons associated with this operation laconically remarked, "It was perhaps a year until they died."[2]

The National Cash Register Company, as well as these two pioneers in local price-cutting, appears to have appreciated at an early date the advantages of this method of competition. The following is a quotation from the record in the suit brought against this organization by the state of Michigan:

Mr. Clark: Page 429 of the Exhibit is as follows:

It is dated at the top of the page October 1, 1897.

[1] R. S. Waddell, quoted in brief for the United States, *United States* v. *E. I. du Pont de Nemours & Company*, U.S.C.C. for the District of Delaware, Vol. II, pp. 18–19.

[2] *Ibid.*, pp. 129–30. According to the same testimony the price of 70 cents was about 5 cents below cost.

"THE N.C.R.

"Losses on opposite side of the Globe made up by gains here, while all the rest of the Company's offices are making a profit."

Mr. Clark: Underneath that is a circle; in the center of the circle is another circle marked "N.C.R. Co.." the circle has around its border a number of crosses with an arrow pointing, one at the top of the circle to figure 2, an arrow pointing to a cross at the bottom of the circle with a number 1, following which is reading matter as follows:

"Temporary losses here on account of competition."

"This circle represents the earth. The small crosses represent the several offices of The National Cash Register Company in every civilized country. Suppose competition springs up in territory pointed out by arrow No. 1. The National Cash Register Company can afford to do business here at a loss if necessary to meet the competition, because the profit made at the office marked with arrow No. 2 will make up for the loss, while all the other offices of the Company all over the civilized globe will make a profit and keep up the income of the Company to its normal amount."[1]

[1] Record, *John E. Bird, Attorney-General, in Behalf of the People of the State of Michigan, ex rel. Henry F. James* v. *National Cash Register Company*, Supreme Court, state of Michigan, Vol. II, p. 985. It is probably true that the losses referred to in this case included competition costs other than the expense of local price-cutting. So far as local price-cutting occurs in the case of the Cash Register Company, it is primarily a development of the use of "knocker machines" discussed in chap. iii *infra*. For other alleged examples of local price-cutting, cf. petition in

From the consumer's standpoint it may be desirable that a concern shall sell its products at as low a price as possible; but this fact does not justify local price-cutting. Any gain to the consumer under this method, in addition perhaps to causing a corresponding loss to some other consumer,[1] is usually of a temporary character. When the organizations against which a campaign of local price-cutting is directed are driven from the field, their business is absorbed by the price-cutting concern. Prices then resume a level at least as high as under fair competition, and frequently they reach an even higher one.

Efficient or inefficient, no organization can long survive a program of local price-cutting. In the case of the inefficient, the unfairness is of little moment. Sooner or later such an organization is doomed to succumb to the efficiency of other concerns. The important economic unfairness of the method, therefore, lies in the destruction of efficient organizations. If the price charged for a given commodity were based

equity, *United States* v. *American Coal Products Company*, for the Southern District of New York, p. 30; original petition, *United States* v. *American Sugar Refining Company*, U.S.C.C. for the Southern District of New York, pp. 98–99.

[1] Through the fact that higher prices may be charged consumers in non-competitive territory.

upon production and selling costs, every organization capable of attaining a certain degree of productive efficiency could compete, and each would have at least a reasonable opportunity of surviving. The inefficient only, under such circumstances, would be eliminated. Under the conditions of local price-cutting, on the contrary, the prices made by the price-cutting organization bear no relation to production costs. Productive efficiency is therefore no defense to competitors against an attack of this character. This quality alone will not enable them to survive. Possibly it may prolong the struggle, yet even this may be doubted. It is not unlikely that the greater the productive efficiency of competitors the more strenuous will be the warfare waged against them.

It may be argued with considerable force that an organization ought not to be deprived of the use of local price-cutting. Assume that a large trust discovers that it is losing business in a given locality to concern A. Because of its efficiency, A has been able to reduce its prices even below those of the trust. Ought not the latter then to be allowed to cut its prices in A's locality in order to regain its lost business? To answer this question in the affirmative is to overlook the serious general consequences of the

use of this method. Price-cutting in selected localities is too dangerous a weapon to be permitted to any organization. If allowed under extenuating circumstances such as those above, there is not and cannot be any guaranty that it will not be employed to destroy all competition. In the foregoing illustration the only method by which the trust should be permitted to regain the business lost to A is by a general instead of a local price-cut. Then if it cuts prices below the cost of production in A's territory, it must do the same throughout the country. In such a situation every dollar lost by A in retaining its business would mean a thousand lost by the trust. A has a reasonable chance of surviving. Strong probability exists that it can endure this state of affairs for as long a period as the trust. If the trust's efficiency so increases that without loss it is able to reduce its prices throughout the country to a level below that of A's cost of production, then A may be forced to the wall. But such an elimination would not be unfair, since it is based upon the survival of the efficient.

CHAPTER II

OPERATION OF BOGUS "INDEPENDENT" CONCERNS

The operation of bogus independent concerns is a method of unfair competition which has also been extensively employed. In fact, it is perhaps more commonly utilized than any other method. A bogus independent concern may be defined as an organization, nominally or apparently independent, which in reality is secretly controlled and operated by another concern in order to destroy independent competition. Two bogus concerns of the former Powder Trust were termed "yellow dog companies" by Mr. T. C. du Pont. An account of their operations adequately illustrates this method of competition:

Q. What do you know about the yellow dog companies, if anything?

. . . . . .

A. May I ask you a question?

Q. Yes.

A. If the president of the company told me, am I permitted to answer?

Q. Yes. That is my judgment, unless the gentlemen differ with me.

. . . . . .

A. During the conversation with Mr. T. C. du Pont, the president, in which he was endeavoring to explain to me the objects of the trust, he told me that . . . . it was necessary for him, ... just like a little boy, to have a dog, to which he could whistle and call.

Q. What kind of a dog?

A. He termed it "a yellow dog," and he explained to me that after I had exhausted all my resources, and those of the traveling men under my office, that if I was not able to regain the trade, that I was to whistle by writing a letter, and that they would then send on a little yellow dog, which, at that time, in the high explosives business, was known as the Climax Powder Manufacturing Company, of Emporium, and the New York Powder Company, of New York. . . . .

Q. Had you occasion to whistle for the little yellow dog?

A. Yes, sir.

Q. Did you do so?

A. Yes, sir.

Q. What occurred. [*sic*] State what you did? [*sic*]

A. If we met the prices, that meant the lowering of our prices on our brands; but the little yellow dog would come in, and we would say that we didn't recognize them at all, that their goods were of no account, and were of low grade, and all that kind of thing; so we didn't have to lower our prices to the adjoining trade; but the yellow dog got the business.

. . . . . .

Q. To whom did they belong to, [*sic*] if you know, that is, the Climax Powder Company and the New York Company?

A. To the trust.

Q. To the trust?

A. Yes, sir.

Q. Was that the E. I. du Pont de Nemours Powder Co.?

A. Yes, sir.[1]

It has been alleged that as early as 1897 the members of the Electric Lamp Combination organized a bogus independent, known as the "Royal Incandescent Lamp Company." In reality this concern was a selling agency for the purpose of marketing the lamps of the combination under the brand name "Regal." These lamps, so it is claimed, were sold at prices intended to deprive independent companies of their customers and trade. The Royal Company was financed by contributions made from time to time by the members of the combination in order to meet the expenses of the scheme.[2]

It has been claimed that effective use of such concerns was likewise made by the old Standard Oil Company. In the dissolution suit brought against that organization the government's

[1] Pet. rec. testimony, *United States* v. *E. I. du Pont de Nemours & Company, cit. supra*, Vol. II, pp. 686 ff.

[2] In equity, *United States* v. *General Electric Company*, U.S.C.C. for the Northern District of Ohio, p. 34.

brief gave a list of sixty-odd concerns which were said to have been operated at various times as independents in different parts of the country. Some of these were individuals, a few of them were actual corporations, while still others had company names.[1]

The old American Tobacco Company is also said to have employed numerous organizations of this kind. In the dissolution suit against that corporation the brief for the United States in the lower court showed nineteen different organizations secretly operated after 1899 by the various tobacco companies belonging to the combination.[2] Some of these secretly controlled companies were directly subsidized by paying them two cents a pound on their output. Still others were supplied with funds and were run at a heavy loss. Considerable care was often taken to give some of these organizations the appearance of being independent. Thus a price list of the R. A. Patterson Tobacco Company (issued in 1905 when the American Tobacco Company owned all of its stock) contained the following statement:

[1] Brief for the United States, *Standard Oil Co.* v. *United States*, *cit. supra*, Vol. II, pp. 520 ff.

[2] Brief for the United States, *United States* v. *American Tobacco Company*, U.S.C.C. for the Southern District of New York, pp. 101–2.

NOTICE.

Our plant is strictly and emphatically independent of all Trusts and Combines. It is useless to suggest to any thoughtful merchant how necessary it is for him to have more than one source from which to secure his goods, and therefore it is to his interest to encourage and support competition in those lines he has to buy.[1]

Similarly, the Wells-Whitehead Tobacco Company, when operating as a bogus concern, said, in advertising certain of its cigarettes, "These are Independent, Anti-Trust, Union-made Cigarettes."[2]

An interesting example of co-operation between a bogus concern and an openly controlled company for the purpose of eliminating competition appears in the scrap tobacco business in Cincinnati. In 1903 the American Tobacco Company sent a man by the name of Galbraith to that city, where he organized the Queen City Tobacco Company, with funds which were furnished him by the American. The Queen City Company engaged in the manufacture of scrap tobacco and began a campaign of extensive advertising, at the same time marketing its product at destructive

[1] Exhibit 64, record, *ibid.*, Vol. V, p. 500.

[2] Exhibit 66, *ibid.*, p. 506.

prices. It was run at a very heavy loss and, at the same time, all connection with the American Tobacco Company was loudly denied.

As the independent scrap concerns were not readily forced out of business, another move became expedient. At that time the Luhrman & Wilbern Tobacco Company was manufacturing scrap at Middletown, Ohio, and was openly controlled by the American Tobacco Company. Beginning about January, 1906, the former concern rapidly bid up the price of tobacco cuttings[1] from 11 to 21 cents per pound, the latter price being more than the normal net price of the manufactured product. The independents at Cincinnati, with the Queen City Company demoralizing the price of the finished product, and Luhrman & Wilbern bidding up the price of the raw material, found themselves between two fires. Their situation speedily became hopeless, and they were shortly after acquired by the American.[2]

The National Cash Register Company also seems to have made some use of bogus concerns. Late in 1905, or early in 1906, Edgar E. Park purchased the Weiler Cash Register Company

[1] Raw material for scrap tobacco.

[2] Brief for the United States, *United States* v. *American Tobacco Company*, *cit. supra*, pp. 105–6.

and conducted it for a time as an independent organization, acting throughout this transaction as the agent of the National. President Patterson first encountered Park at Hot Springs and employed him about 1903 or 1904. His salary varied from twelve thousand to eighteen thousand dollars a year, and he was constantly in the employ of the company for a period of several years.[1] His connection with the National, however, was kept entirely secret. It was not known outside that organization nor generally even in its own offices where it was arranged that he should report especially either to Chalmers[2] or to President Patterson.

On the suggestion of Park the Universal Cash Register Company was organized for the purpose of providing him with a vehicle for his operations.[3] As the representative of the Universal, another independent, Park approached the competitors of the National on a friendly basis. He usually appears to have stated that he was in the cash-register business on a large scale and that he desired to organize

[1] Lee Counselman, record, *State* v. *National Cash Register Company, cit. supra*, Vol. I, pp. 593–94.

[2] At that time Chalmers was the general manager of the National.

[3] Hugh Chalmers, record, *Patterson* v. *United States*, U.S.C.C. of Appeals, Sixth Circuit, Vol. I, pp. 469–70.

a big concern by combining five or six of the independent cash-register companies in order to compete with the National.

Park worked for several months on the Weiler proposition and finally made the purchase with funds supplied by the National. During the negotiation Carl G. Heyne, openly representing the National interests, was constantly calling upon Mr. Weiler and using his best efforts to prevent that gentleman from suspecting any connection between Park and that company. As previously indicated, it was not made known that the National had any interest in the Weiler concern either at the time of the purchase or for many months thereafter. The Weiler registers were sold through jobbers and as independent machines in apparent competition with those of the National Company. Park operated the concern and made reports to Chalmers.[1]

The Union Computing Machine Company of Trenton, New Jersey, was also purchased by the National and operated as an independent under the name of the Union Cash Register Company. Park officiated in this transaction, and the history of the purchase is rather inter-

[1] Hugh Chalmers, record, *Patterson* v. *United States*, *cit. supra*, Vol. I, pp. 477–78; Carl G. Heyne, record, *State* v. *National Cash Register Company*, *cit. supra*, Vol. II, pp. 955–56.

esting. During the summer of 1906 Rush Taggart, the head of the Union Company, met a man by the name of Park, who had an office in Nassau Street. This gentleman occasionally talked to Taggart in regard to the cash registers which he claimed to be turning out at his plant in Detroit. He also spoke of a high-grade French machine which he proposed to form a company to market. Several weeks elapsed before he spoke to Taggart of purchasing the Union. In September or October, however, he stated that he wished to secure a line of machines of medium price which would fit in between the low-priced machines which he was manufacturing at Detroit and his high-grade French machines, thus completing a general line. Taggart finally agreed to his proposition, and the Union was purchased by Park with funds supplied by the National.[1] No one knew of this purchase at the time except persons connected with the head offices of the National, and the Union Company was conducted as an independent for about a year, and its registers were sold by the Union agents.[2]

[1] Rush Taggart, record, *Patterson* v. *United States*, *cit. supra*, Vol. I, pp. 516–17.

[2] Hugh Chalmers, *ibid.*, p. 470. It is doubtful if the operations of Park and the Universal Cash Register Company, so far as they relate only to the purchase of independents, can be regarded

In meeting competition in second-hand machines the National Cash Register Company made frequent use of bogus concerns. All told, there have been a number of second-hand cash-register concerns operating in the United States at one time and another. Some of them became very prosperous, and, as a result, gave the National's agents a considerable amount of trouble. In order to deal with this competition, a series of second-hand stores was established by the National, and Mr. T. J. Watson was assigned to take charge of the second-hand situation.[1] The Watson Cash Register Company was organized with National money and established itself first in Chicago close to Tuckhorn & Company and the Chicago Cash Register Exchange, both independent dealers. About the same time a branch was opened in Philadelphia and

as unfair unless it be through the fact that in this way it was possible to acquire information under false or misleading pretenses in regard to the business of competitors (cf. *infra*, chap. x). Some may be inclined to feel that the purchase of independents through the false representations involved in Park's operations was unfair since it might have been impossible for the National to have acquired such concerns openly. At the same time it must be recognized that there is nothing unfair *per se* in the purchase of one organization by another. This leads to the conclusion that the actual purchases through Park, though perhaps sharp business practice, were not unfair.

[1] Joseph E. Warren, record, *State* v. *National Cash Register Company*, *cit. supra*, Vol. I, p. 436.

one in St. Louis, besides. Watson also bought out Fred Brainin, the New York Cash Register Exchange, of Fourteenth Street, New York City, a leading second-hand dealer, which gave him still another agency. In the South the Southern Cash Register Company was a most troublesome second-hand competitor. To assist in the fight against this organization, Watson bought out another second-hand concern, the Atlanta Cash Register Company.[1]

All these branches appear to have been operated as independents. In most cases the contests thus inaugurated resulted in the absorption of the competing organizations. It seems to have been impossible for the independents to cope with the situation, and they finally gave up the struggle in the majority of cases.

Yet another interesting example of bogus concerns may be given. The Royal Baking Powder Company is a large consumer of starch, and, in February, 1908, it acquired control of the Western Glucose Company. The latter was originally organized for the purpose of manufacturing glucose and other corn products, and

[1] Carl G. Heyne, *ibid.*, Vol. II, pp. 916–40. According to testimony, Watson also operated at one time or another in both Cleveland and Baltimore.

erected a plant at Roby, Indiana. After the purchase its name was changed to the American Maize Products Company, it being the intention of the Baking Powder Company that it should engage in the manufacture of glucose, starch, and other corn products. To this the Corn Products Refining Company objected,[1] and an agreement was finally reached whereby the American Maize Products Company arranged to sell its surplus, over the requirements of the Baking Powder Company, to the Corn Products Refining Company. Thereupon, as alleged by the government, the Corn Products Refining Company employed Stein, Hirsh & Company of New York[2] to sell the products purchased from the American Maize Products Company in competition with independent glucose manufacturers. Stein, Hirsh & Company, in pursuance of this plan, announced that they had just completed a new

[1] The grounds of the objection of the Corn Products Company lay, of course, in the fact that it was engaged in manufacturing a line similar to that of the Western Glucose Company and was not desirous of other competition than it already had. The objections according to the allegations took the form of threats to embark in the baking-powder business and led to a compromise. Cf. *infra*, chap. x.

[2] This firm is alleged to have been engaged in the business of packing and selling starch, dextrines, and the like, and to have acted as brokers in the sale of corn products.

glucose factory, and that they were prepared to offer various corn products at low prices. It is also asserted that they held themselves out as independent manufacturers seeking a market for their goods, although the glucose was in fact that sold by the American Maize Products Company to the Corn Products Company. The same firm, it is claimed, was directed to confine its sales to the customers of independent manufacturers, being strictly forbidden to sell the customers of the Corn Products Company. In order that customers and manufacturers might not learn the source of supply, all shipments from the American Maize Products Company were made under fictitious names.[1]

The American Can Company is another example of a concern using bogus independents. In 1915 this organization acquired the American Stopper Company, which had been organized in 1901, and which manufactured decorated tin boxes. After the acquisition, as shown by a letter introduced in the Can record, the stationery of the American Stopper Company carried beneath the name of the company the

[1] Petition in equity, *United States* v. *Corn Products Refining Company*, U.S.D.C. for the Southern District of New York, pp. 22–24. Cf. also allegations of bogus concerns in original petition, *United States* v. *Sugar Refining Company*, *cit. supra*, p. 148.

following statement: "The Largest Maker of Tin Boxes Outside of the Trust."[1]

Conrad Diesel testified that in 1906 the Union Stock Yards Can Company was taken over by the American Can Company. Diesel was at that time the assistant general manager of the former organization and was made its vice-president and general manager by the American Company following the acquisition. He further testified that the Stock Yards Can Company was operated as an independent company and that he was instructed to keep secret the fact that it was owned by the American Can Company.[2]

Similarly, it was charged in the suit against the Central West Publishing Company, American Press Association, and others that the American Press Association maintained for many years, in various cities of the country, houses known under different names which were understood by newspapers generally to be independent organizations. When the American Press Association did not desire to sell to a particular customer at a certain price, or if it lost such a customer on account of the prices

[1] Record, *United States* v. *American Can Company*, U.S.D.C. for the District of Maryland, Vol. XII, p. 5647.

[2] Conrad Diesel, *ibid.*, Vol. VIII, pp. 3805–3806.

which it made, one of these houses would be instructed to get the business at such a price as might be necessary to obtain it.[1]

In the fertilizer industry a very large number of supposedly independent concerns have been operated. It is worth noting that in the great majority of cases these concerns have been employed by the larger manufacturers. Some thirteen of the latter have controlled forty-odd manufacturing subsidiaries, fifty-odd selling subsidiaries, and seventy-odd affiliated manufacturing companies, all of which were operated without disclosing their identity. Two of the larger organizations, Swift & Company and Baugh & Sons, have not controlled any unidentified company.[2]

The operation of bogus concerns has also been alleged in the case of at least one common

[1] Petition in equity, *United States* v. *Central West Publishing Company*, U.S.D.C. for the Northern District of Illinois, pp. 16–17.

[2] Federal Trade Commission, *Report on Fertilizer Industry*, chap. viii. In this industry it has been asserted that "the main purpose" of the use of secretly controlled companies "has been to secure the services of a larger number of local dealers for the sale of goods in a given locality. Where there are several dealers in a town each one desires to handle a line of goods not handled by the others. If all of the business of a fertilizer company were done in its own name, it would have, generally speaking, only one representative in a town, while by means of subsidiaries it may have all the dealers as representatives. It is claimed that several representatives, each pushing particular

carrier. The Enterprise Transportation Company was incorporated in Massachusetts about 1905, and from that time until 1908 it operated steamers between New York and Providence, Newport, Fall River, and Narragansett Pier. It had connections with the trolley lines which radiated from these points, thus possessing through routes to and from New York City. It was asserted that, for the purpose of suppressing this competition, the New York, New Haven & Hartford Railroad Company caused the incorporation in the state of Connecticut of the United States Transportation Company. This organization purchased two steamers, the "Rhode Island" and the "Connecticut," which boats were placed in operation between New York City and Fall River as an independent line known as the Neptune Line.

brands, secure more business than one representative handling all the brands of a company" (*ibid.*, pp. 179–80).

The soundness of this claim is open to some question. There is nothing to prevent a manufacturer from allotting his various brands one to each dealer in a particular locality so that each dealer will be handling a line different from that of any other even though it does not bear the name of a different company. The value of brands and good-will also need not necessarily be lost if the name of the controlling company is published merely as a successor company, the brand and name of the original company being retained on the packages.

It should be noted that as a result of a series of conferences with the Federal Trade Commission the majority of the fertilizer companies have voluntarily agreed to identify their subsidiary and affiliated companies.

Furthermore, in 1905 the Joy Line, which was operating from New York to Providence and Boston, was secretly purchased by the New Haven through the New England Navigation Company. During the succeeding two years this control was continued and the Joy Line also was operated ostensibly as an independent company in competition with the Enterprise Transportation Company.[1]

An examination of this method of competition shows that there are two important points of difference between the method of bogus concerns and the method of local price-cutting. In the first place, the former offers facilities for obtaining information which are not afforded by the latter. Disclaiming all connection with a trust, a bogus organization is frequently placed in a favorable position to learn the names of the customers of independent competitors and to secure valuable information regarding their manufacturing methods, trade secrets, and business generally. The information thus acquired is transmitted to the parent organization, thus contributing to further its efforts to destroy independent business.

[1] Original petition, *United States* v. *New York, New Haven & Hartford Railroad Company*, U.S.D.C. for the Southern District of New York, pp. 70–74.

A very good illustration of what may be expected of a bogus concern in this way can be cited from the history of the old American Tobacco Company. The Wells-Whitehead Tobacco Company, claiming to be an independent concern, though in fact owned by the Trust, manufactured cigarettes at Wilson, North Carolina. At the same place the Ware-Kramer Company, a genuine independent, was endeavoring to build up a business. A letter to W. M. Carter, an officer of the Wells-Whitehead Tobacco Company, from the vice-president of the American Tobacco Company, and the accompanying testimony, is as follows:

DEAR SIR:

We are advised that a car-load of cigarettes has been exported to China by the Ware-Kramer Tobacco Company. If possible I wish you would ascertain to what port these goods were shipped and the name of the consignee. If you cannot learn the name, perhaps you can find out the markings on the cases, as well as the point in this country from which the goods were shipped by steamer.

Yours very truly, * * *

In writing with a pen, this:

A car-load means to us about five million cigarettes. If we get this information I think we can shut off their market. You wrote and sent this letter?

A. Yes. We were interested in the British American and any information we can give them we are going to do it. We are hired to look after our business and that is what we are going to do if we can.[1]

A second point of difference between the method of local price-cutting and the method of bogus concerns lies in the fact that the former is geographically limited while the latter is not so restricted. Occasionally a bogus independent concern operates for a given period within such a relatively small area that its price-cutting is essentially local in character. For example, several of the bogus organizations operated by the old Standard Oil Company were merely peddling concerns. On the other hand, this is not always or even usually the situation. The bogus concern may sell over such a wide territory that its operations can in no sense be regarded as local in character, as is clearly illustrated by the case of the bogus concern operated by the Corn Products Refining Company.

From another point of view, however, local price-cutting and bogus concerns are closely analogous to one another. Where either method is used, prices are made practically without reference to cost and are governed solely by the competition which must be met.

[1] Brief for the United States, *United States* v. *American Tobacco Company*, *cit. supra*, pp. 104–5.

When the competition to be suppressed is essentially local in character, the method of bogus concerns would appear to be superior to local price-cutting. A concern operating a bogus independent need not, and generally does not, cut its own prices. Although this is the case, the trust may be able, through the good-will which it has developed, to retain at least a considerable proportion of its established trade. Perhaps in exceptional cases it may retain practically all of it. The latter situation is especially likely to occur when the bogus organization is instructed, as is sometimes the case, to make no attempt to sell anyone except the customers of independents, or when, as in the Corn Products Refining Company case cited above, it is forbidden to sell to the trade of the trust under any circumstances. Under the method of bogus independent concerns, therefore, the trust sustains no loss upon the business which it retains but only upon that which it secures through the bogus concern from the customers of bona fide independents. On the other hand, when the method of local price-cutting is used, the trust is compelled to sustain a loss, not only upon the business obtained from the customers of independents, but also upon that of its old customers as well. Practically

all of the latter it is certain to retain in view of its lower prices.

The unfairness of competition conducted by means of bogus concerns is evident. Since prices are determined with reference to destroying competition and not with reference to costs, productive and selling efficiency is a no more efficacious protection than it is under local price-cutting. These qualities alone will not enable an organization to survive. In addition, a further unfairness is to be found in this method in that it affords opportunities for acquiring information in regard to the business of competitors which do not exist in case of local price-cutting.

CHAPTER III

FIGHTING INSTRUMENTS

Closely related to local price-cutting on the one hand and the operation of bogus concerns on the other are "fighting instruments." Certain ships, articles, and goods at one time and another have been utilized for the purpose of destroying competition through destructive price-cutting. While fighting ships or brands of goods are thus pushed by the organizations using them in competition with independent ships or goods, yet as a general rule such concerns at the same time fully maintain their prices or charges except in the case of the fighting instrument.

Prominent among these devices are the so-called "fighting ships" employed by the various steamship conferences.[1] The "fighting ship" is usually called into service when competition is inaugurated in a trade nominally controlled by conference lines. As soon as the new competitor announces a sailing date, the conference issues a circular to shippers advertising

[1] For explanation of the steamship conference, see *infra*, chap. vii.

a steamer to sail upon or about the same date. The conference circular usually offers a rate which is intended to prevent the new line from securing a cargo.[1]

An interesting development of fighting ships was found in the Syndikats-Rhederei. This organization was a vessel-owning corporation with a capital of $1,428,000, through which were operated the fighting ships of the six largest Hamburg steamship companies engaged in the extra-European trade. Nominally the company was engaged in commercial transportation enterprises, but primarily it was a defensive corporation, the capital stock of which was owned in the following proportions by the various companies: Hamburg–American Line, $785,400; Hamburg–South American Line, $166,600; German Steamship Company, $154,700; C. Woerman, $119,000; German–Australian Steamship Company, $130,900; and the German East Africa Company, $71,400. The proportion of shares held was determined according to the tonnage of each line. Four relatively small and inexpensive ships were purchased by the corporation. These with others

[1] *Proceedings of the Committee on the Merchant Marine and Fisheries in the Investigation of Shipping Combinations*, pp. 265, 1252–54, 1257. Numerous specific illustrations of this practice will be found scattered through the same report.

chartered when the need arose were "hired out" to the six owners to meet competition and to make it unprofitable. When not engaged in a "fight," these steamers found employment upon regular time charters.[1]

The operation of fighting ships, however, seems not to have been confined to foreign trade. In 1914, the Manhattan Navigation Company filed a bill of complaint against the Hudson River Navigation Company. In that document the claim is set up that for four years the latter company operated two steamboats between New York and Albany charging rates of transportation for both freight and passengers which were much less than cost. These steamers, it is asserted, were advertised to sail and did sail at or about the same hours as the steamers of the Manhattan Company, the intention being to bring about the financial destruction of that organization.[2]

Easily the most notorious instance of the use of fighting brands was in the case of the plug-

[1] Report of Robert P. Skinner, consul-general at Hamburg, Germany, *Special Diplomatic and Consular Reports for the Use of the Committee on the Merchant Marine and Fisheries, Dealing with Methods and Practices of Steamship Lines Engaged in the Foreign Carrying Trade of the United States*, pp. 53–54.

[2] Complaint, *Manhattan Navigation Company* v. *Hudson River Navigation Company*, U.S.D.C. for the Southern District of New York, p. 8.

tobacco war which continued roughly from 1894 to 1898. In the years immediately following its organization the old American Tobacco Company controlled a relatively small proportion of the plug-tobacco output of the United States. In 1894 its total production was only 8,974,118 pounds, and at least three companies were annually producing a much greater amount than this. As early as 1890 Liggett & Myers claimed to be manufacturing over twenty-seven million pounds annually. Next to Liggett & Myers ranked the Lorillard Company; and in 1893 the claimed output of the Drummond Tobacco Company of fourteen million pounds was far in excess of the American's.

The principal brand which was selected by the American Tobacco Company for the attack upon its competitors was known as "Battle Axe." In 1891 this tobacco sold at retail for fifty cents a pound. In 1894 consumers purchased it for thirty cents and in the succeeding year for a time the price to jobbers was as low as thirteen cents. As the internal revenue tax at that time was six cents a pound, this price left only seven cents a pound to pay for the leaf and the cost of manufacturing and distributing.

As noted above, the American sold less than nine million pounds of plug in 1894. Under the

price-cutting attack of 1895 it enlarged its sales to twenty-one million pounds, an increase of, roughly, 130 per cent. Two years later, in 1897, its sales amounted to thirty-eight million pounds, an increase of 80 per cent over its output in 1895, and of more than 320 per cent over that of 1894. In the four years from 1894 to 1897 inclusive the proportion of the plug-tobacco output of the United States controlled by the American increased from 5.6 to 20.9 per cent. In the same period the profits of that organization declined heavily. In 1894 its net earnings were approximately five million. In the next year, with an increase of twelve million pounds in sales of plug tobacco, the earnings were approximately one million dollars less. The accounts of the company show that the loss on the manufacture and sale of plug tobacco in 1896 amounted to over one million dollars in the face of a sales increase over 1894 of about twenty-two million pounds. Although in 1897 the American Tobacco Company sold nearly thirty million pounds more of plug than in 1894, its earnings were approximately $800,000 less; while in 1898 the loss on the plug-tobacco business alone was over $800,000.[1]

[1] *Report of the Commissioner of Corporations on the Tobacco Industry*, Part I, pp. 95–98.

The "knocker machines" of the National Cash Register are a most interesting example of fighting instruments. A "knocker" "was a machine that was devised and built and constructed for the purpose of meeting competition and placed on the price list under the head of miscellaneous and was only used in cases of extreme competition; it was also understood that we were not allowed to sell this register only in case of extreme competition; that is, the National agents."[1]

Hugh Chalmers, formerly vice-president and general manager of the National Cash Register Company, gave further details regarding "knocker" machines:

> We had a great many different kinds of machines, and when a competing machine was placed upon the market, we would discuss which one of those machines, if we had one, would be best suited to meet that competition. If we did not have any machine to meet it, we would build one in the inventions department. The way we would meet competition in the field was that if a man was offering an Ideal register or a Hallwood register, or a register of any other make, our salesman would have one that would have all the functions that that machine would have, that he would offer to sell for less price than the other machine was offered. In the parlance of the National Cash Register

[1] Henry F. James, record, *State* v. *National Cash Register Company, cit. supra*, Vol. I, p. 56.

Company such a machine was called by a number. It did not have any other name or designation when I was there. I have heard the term "knocker" used. As I understand it that term was a name given to machines by our competitors that were used against them in competition. These machines that I say were given numbers were machines of that character. The price of that machine that we would send out in competition was fixed at what we wanted to sell it for. Our price was always based on the price of the competition machine and never upon the cost of manufacture.

. . . . . .

When I say that we built machines as nearly like the competitive machine as possible, I mean in appearance and in the function that the machine performed. . . . . Our idea was to build a machine to meet that competition. I do not necessarily mean that we copied the mechanism of that machine. . . . . I mean that we would build a machine that had the same function, the same features on it that this other machine had, that would do the same thing, whether in the same way or not.[1]

The United States government has alleged that the Thread Combination has made use of "fighting brands" of thread. It was charged that when an independent thread manufacturer had succeeded in developing an appreciable business, the agents of the combination revived

[1] Hugh Chalmers, record, *Patterson* v. *United States*, *cit. supra*, Vol. I, pp. 457–59.

one or more of those brands whose use had been discontinued. These revived brands were known as "fighting brands" and they were sold at prices below the cost of production solely to the customers of independent organizations. Regular salesmen seldom handled them. Instead they were marketed by special sales forces known as "flying squadrons" which were sent on the road by the combination. Independent jobbers who refused to deal with the combination were asserted to have been attacked in a similar fashion.[1]

The Eastman Kodak Company and allied concerns appear likewise to have made extensive use of fighting brands at one time and another. As early as 1898 or 1899 the Rives and Steinbach papers which were produced by the General Paper Company were probably the most suitable raw papers in existence for the gelatine printing-out process.[2]

In the original exclusive contract for handling these papers in the United States which was obtained by the Eastman Kodak Company

[1] Petition in equity, *United States* v. *American Thread Company et al.*, U.S.D.C. for the District of New Jersey, p. 14. These practices were enjoined by the decree of the court entered June 2, 1914.

[2] For an explanation of this fact cf. *infra*, chap. viii.

there appeared the following clause, known as the fighting-brand clause:

In case any printing-out paper sensitized on other raw paper than that furnished by the General Paper Co. should make it [*sic.*] appearance in said territory, and in order to drive it out of the market it becomes necessary for the Kodak Co. to reduce the prices of its paper, then the General Paper Co. shall, during not more than six months, allow to the Kodak Co. a proportionate rebate on the price of its plain and baryta-coated papers used in the manufacture of the printing-out paper sold at such reduced price.[1]

The year after the above contract was made Eastman wrote to Paul Puttman, at one time representing Steinbach & Company and later the General Paper Company, suggesting that the General Aristo Company[2] maintain three fighting brands of photographic paper: one for gelatine paper, one for collodion paper, and one for gelatine developing paper. Eastman

[1] General Paper Company, Steinbach & Company, Blanchet Frères & Kleber, and Eastman Kodak Company, terms of sale, October 20, 1898, *re* Raw-Paper Government Exhibit 14, record, *United States* v. *Eastman Kodak Company*, U.S.D.C. for the Western District of New York, Vol. V, p. 2048. For further details in regard to this contract cf. *infra*, chap. viii.

[2] The General Aristo Company was the branch of the Photographic-Supplies Combination which at that time marketed paper.

testified that he was not sure "whether we adopted them in each of the three lines, but we did adopt them in some of the lines at any rate."[1]

Kresko paper marketed by the Eastman Kodak Company appears to have been used as a fighting brand about 1900. In a letter to the Morrison Photographic Supply Company we find the following paragraph:

> Would state that Kresko paper in [*sic*] not to be sold over the counter indiscriminately, but is to be sold by you only to professional photographers located in Pittsburg, and to such other photographers as we have given you special authorization to sell to. The understanding is that we desire to limit the sale of Kresko paper as much as possible; consequently you should not sell same to anyone not located in territory mentioned in our special authorization letter of May 17, 1900, unless you have informed us that such photographer is using paper other than that of General Aristo Company manufacture, and for this reason it becomes necessary to sell Kresko to them in order to hold their patronage. It would manifestly be a mistake to sell Kresko to a photographer who is regularly using Solio paper.[2]

[1] George Eastman, record, *United States* v. *Eastman Kodak Company, cit. supra*, Vol. III, pp. 1286-87.

[2] The Eastman Kodak Company to Morrison Photographic Supply Company, April 23, 1901, Government Exhibit, 270, record, *ibid.*, Vol. VI, p. 3208.

The "statement of claim for loss on sales of 'fighting brand' papers" which was annexed to the 1910 contract between the General Paper Company and the Eastman Kodak Company was certified by Price, Waterhouse & Company and showed a total loss for the three years 1907, 1908, and 1909 of $327,596.40.[1]

There are points of close resemblance in the use of fighting instruments on the one hand and in the employment of both local price-cutting and bogus independent concerns on the other. Comparing first, for example, the method of local price-cutting with the method of fighting instruments, it is clear that the two are invariably alike in that prices are made or determined, not with reference to production and selling costs, but solely in order to destroy competition. Secondly, it is also evident that in frequent instances the use of fighting devices may be confined to a particular locality or localities. Thirdly, fighting instruments may, if desired, be offered to anyone within the locality regardless of whether the purchaser is a customer of the concern marketing the particular device or of an independent com-

[1] General Paper Company, Steinbach & Company, and Eastman Kodak Company, June 30, 1910, Government Exhibit 139, record, *United States* v. *Eastman Kodak Company, cit. supra*, Vol. V, p. 2411.

peting organization. Whenever a concern sells under these three conditions, there is no essential distinction between local price-cutting and fighting instruments. In such cases, therefore, the latter method must be condemned as unfair upon the same grounds as the former.

Fighting instruments, however, are not always or perhaps even usually restricted to local use. As is shown by the Thread and Tobacco cases above, they may be, and have been, used practically without territorial restriction. It is also unnecessary that a fighting instrument should be offered to the trade generally, as is usually the case under local price-cutting. Instead it may be presented for sale to customers of independent competing organizations only, as in the arrangements of the Thread Combination. In the latter case the manner of compensating the losses incurred differs somewhat from that under local price-cutting. In the use of the latter method the loss sustained may be made up by the higher prices charged in non-competitive or nearly non-competitive localities. In the use of fighting brands the loss may conceivably be compensated by the prices exacted on similar lines sold to regular customers who do not purchase of competitors and to whom fighting

brands are not usually offered. Or again, the loss may be offset by the prices charged for other manufactured lines upon which no price-cutting campaign is being conducted.[1]

The differences which may exist between local price-cutting and fighting instruments, however, in no sense render the latter practice fair. An efficient organization may be in little or no better position to survive an extensive fighting-brand campaign than to outlive a severe attack of local price-cutting. Measured by the criterion of efficiency which has been laid down, therefore, fighting brands are open to equal condemnation with local price-cutting.

The resemblance between the method of bogus independent concerns and the method of fighting instruments may likewise be a close one. As was indicated in the preceding chapter, the Royal Incandescent Lamp Company, acting as an independent, marketed the Regal lamp, the members of the combination paying the requisite expenses. Clearly the Royal Incandescent Lamp Company was a bogus independent concern, and it is equally evident that the Regal lamp should be regarded as a fighting brand. By virtue of the usual purpose

[1] It is of course obvious that the losses on fighting instruments may not always be fully compensated.

of a bogus concern, goods marketed by it may generally be regarded as fighting brands. As a rule, where either bogus concerns or fighting brands are used prices are made without reference to costs and goods are sold solely for the purpose of suppressing and destroying competition.[1] It is, in consequence, necessary to regard as an integral part of the operation of the bogus concerns brands pushed through such an agency at cut prices in order to destroy competition.

From whatever angle they may be viewed, therefore, fighting instruments must be regarded as unfair competition. Their use nullifies the productive and selling efficiency of other organizations and makes possible their destruction in spite of these qualities.

[1] Some few exceptions may be found in the case of bogus concerns. Cf. preceding chapter regarding fertilizer business where a different purpose seems to have been involved.

CHAPTER IV

CONDITIONAL REQUIREMENTS ("TYING" CLAUSES)

Upon the processes of producing and marketing commodities many organizations have, with varying degrees of success, imposed certain conditional requirements. Such arrangements appear in considerable variety, and they are perhaps the most interesting of any of the methods of unfair competition. A concern may require:

A. The purchase of commodities for which the patents have expired as a condition of purchasing patented commodities.

B. The use of commodities for which the patents have expired as a condition of the lease or use of patented commodities.

C. The use of unpatented commodities as a condition of the lease or use of patented commodities.

D. The leasing and use of one or more patented commodities as a condition of the lease and use of other patented commodities.

E. The handling of new lines of commodities as a condition of continuing to handle old lines.

F. The purchase of certain commodities as a condition of the purchase of other commodities.

G. The use of certain patented commodities as a condition of the lease of certain other unpatented commodities.

It will probably be evident to the reader that these seven classes of conditional requirements by no means exhaust the possibilities of such arrangements. Clearly an almost indefinite number of such conditions might be devised, each being designed to meet the exigencies of a particular situation. The seven enumerated, however, are probably sufficient to illustrate satisfactorily the unfairness of practically all such arrangements.

For purposes of discussion they may be divided into three groups determined with reference to the factor which enables an organization to impose such restrictions.

I. Conditions A, B, and C are based on the fact that in each case the concern imposing the restriction possesses a patent monopoly in a single article.

II. Condition D is based upon the fact that the concern making the requirement possesses a patent monopoly in two or more articles.

III. Conditions E, F, and G are based upon the fact that the concern making them possesses an extensive or predominant control of certain articles.

I

A. By a series of contracts made in 1906 and 1909 with foreign parties the Electric Lamp Combination acquired the exclusive rights for the United States to the use of the inventions, patents, and applications covering tungsten- and tantalum-filament lamps. The advantages of lamps of these types—economy in the cost of service, etc.—are too well known to require enumeration. Necessarily they compete with carbon-filament lamps, and in order to meet the demands of the trade, jobbers and dealers were practically compelled to carry stocks of all three types of lamps. The combination then offered a contract to the trade which provided for the sale of tungsten- and tantalum-filament lamps to such dealers and jobbers as would also purchase from it and its subsidiaries all of the carbon-filament lamps which they required. The patents upon carbon-filament lamps had expired in 1894. The contract, therefore, appears unquestionably to have been an attempt to compel dealers and jobbers to purchase solely from the combination certain articles which might otherwise have been secured from outside organizations.[1]

[1] Petition, *United States* v. *General Electric Company*, *cit. supra*, pp. 10–11, 27–32. It should be noted that the final decree of the court in this case forbade the continuation of this practice.

B. The leases of the United Shoe Machinery Company have quite generally contained what are known as "tying" clauses. Such clauses require that certain machines shall be used only in connection or in conjunction with certain other designated machines. Sometimes, as will appear later, they have tied together two patented machines, making their simultaneous leasing and utilization necessary. In certain other cases the leases in question have tied to patented machines others upon which the patents have expired.[1] The effect of the latter type of condition is well described by Mr. Jones:

In 1900, at the time of the original controversy over these leases, most of the machines were protected by

[1] The following is an illustration of a Shoe Machinery tying clause: "The leased machinery shall be used only in the manufacture of boots, shoes and other footwear made by the lessee known in the trade as 'Goodyear welts,' which have been or are to be welted wholly by Goodyear welt and turn shoe machines or Goodyear universal inseam sewing machines held by the lessee under lease from the lessor, and the soles of which have been or are attached to their welts wholly by Goodyear outsole rapid lockstitch machines held by the lessee under lease from the lessor, or in the manufacture of boots, shoes, or other footwear made by the lessee known in the trade as 'Goodyear turns,' the soles of which have been or are to be attached to their uppers wholly by Goodyear welt and turn shoe machines or Goodyear universal inseam sewing machines held by the lessee under lease from the lessor. . . . . Lease and license No. 5196 K."—(Goodyear Department) Sewing and Stitching Machines between the United Shoe Machinery Company and R. H. Long Shoe Manufacturing Company in Hearings before the House Committee on the Judiciary, Trust Legislation Serial No. 2, Patent Legislation Serial No. 1, 1912, p. 140.

valid patents, and we were advised by our counsel that if we desired to use their patented machines we should probably have to do so on whatever terms they saw fit to impose; but these important patents were nearing the day of their expiration, and at the present time (1912) a very large proportion of the important basic patents have expired, and but for the restrictions imposed upon us by their leasing system we should today be exercising our undoubted right to use, without royalty, a large part of the machinery now employed.[1]

The Crown Cork and Seal Company, of Baltimore, manufactures more tin caps for bottles than does any other concern in the United States, and probably more than any other concern in the world.[2] The same company also controls patents upon a certain device known as the Jumbo capping machine, which is used to put the caps on bottles. None of the machines are sold, but they are leased to brewing and bottling establishments under agreements which provide, among other conditions, that the "said machine shall be used only in connection with crown corks purchased by the lessee directly from the lessor."[3] As the patents upon the

[1] Charles H. Jones, Hearings before the House Committee on the Judiciary, Trust Legislation Serial No. 2, Patent Legislation Serial No. 1, 1912, p. 65.

[2] Alexander Whiteside, *ibid.*, pp. 163–64.

[3] Lease and license agreement, *ibid.*, p. 164. Reprinted in the writer's *Industrial Combinations and Trusts*, pp. 266 ff.

caps expired years ago, the lease attempts to compel bottlers to purchase all caps from the Crown Cork and Seal Company.

C. In the nineties the Heaton Peninsular Button Fastener Company controlled letters patent granted for improvements in button-fastening machines. These machines were sold outright with the condition attached that they should be used only with button fasteners made and sold by that company and known as "Peninsular Fasteners." This condition was to be found upon the bill of sale and also upon tags and caution plates which were attached to the machine. In 1890 a man by the name of Dick began the manufacture of a new metallic fastener capable of and intended for use upon the Peninsular machines. By solicitation and advertisement he secured many customers and began to build up a considerable business; but the Button Fastener Company quickly brought suit against him and secured an injunction restraining the marketing of the device.[1]

In considering the reasons for regarding the conditions of the first group as unfair those of types A and B may be distinguished from type C.[2]

[1] *Heaton Peninsular Button Fastener Company* v. *Dick*, 55 Fed. 23.

[2] It is also true that on grounds of legality A on the one hand may be distinguished from B and C on the other. In the decree

The two former apply to articles upon which the patents have expired; the latter to articles unpatentable and unpatented. While both are unfair, the reasons for so regarding them are not identical. As regards A and B, the theory which underlies the grant of monopoly in a patent is, of course, that human progess is promoted by the gift to inventors for a term of years of the exclusive property in their inventions. At the end of this period, however, it is intended that the inventions shall become the property of the public. For this reason

against the Electric Lamp Combination (A above) the defendants were "perpetually enjoined and restrained from making or enforcing any contracts, arrangements, agreements or requirements with dealers, jobbers and consumers, who buy . . . . either tantalum filament, tungsten filament, metalized carbon filament or ordinary carbon filament lamps, or any of them, by which such dealers, jobbers and consumers are compelled to purchase all their ordinary carbon filament lamps . . . . as a condition to obtaining such other types of lamps, or any of them" (final decree, *United States* v. *General Electric Company, cit. supra*, p. 7). On the other hand, the Shoe Machinery, Crown Cork, and Button Fastener conditions (B and C above) are probably all three legal under the decision in the Button Fastener case (55 Fed. 23) and the later decision in *Henry* v. *Dick* (224 U.S. 1), being but valid use restrictions imposed upon patented articles. There is no inconsistency in these two divergent legal views. Restrictions upon the manner in which a patented article may be used have been repeatedly held valid, and this is the prevailing legal view. It is evident that in the Electric Lamp case no use restrictions existed. Consequently the condition in that case could not be upheld upon the same legal ground as the conditions imposed by these other organizations.

inventors are required to give their specifications to the patent office. When the term of the patent expires, the community thereupon receives the benefit of the invention through a complete knowledge of all its details. For the term of his patent the inventor receives the profits from sales or royalties from leases or similar arrangements. At its expiration he ceases to be entitled to further emoluments. The community then reaps the advantages of the device free from any further burden arising from the right and property of the inventor in his invention.

Theoretically anyone may begin the production of an article previously patented as soon as the term of the patent expires. Actually, however, no one may be able to do so. Conditional requirements may so destroy the market that even if the goods were produced there would be no customers to purchase. This precise situation seems to have developed through the "tying" clauses of the Shoe Machinery Company applying to released patents. Upon this point the following bit of testimony is worth quotation:

MR. RUCKER: Was there anything to prevent other manufacturers from manufacturing each one of those machines that they designate "essential"?

MR. JONES: Such machines as embody the expired patents have not been manufactured, *for the reason that in this country no one could be found to purchase them.* . . . .[1]

A manufacturer who has begun the production of goods upon which the patents have expired ought, under previous assumptions, to have a free and open market for those goods. If this is denied him, the competition is no less unfair than if the market is entirely closed, as in the Shoe Machinery case. If the market is not a free and open one, the manufacturer's productive efficiency, however great it may be, is of no advantage to him. His sales are and will continue to be restricted, even though the same article produced by his competitors is both more costly and of a poorer quality. As a result he may be compelled to discontinue business, either because of its lack of profit or through the prospect of bankruptcy.

The conditional requirements of both the Electric Lamp Company and the Crown Cork and Seal Company deny an open market to competitors manufacturing goods for which the patents have expired. This fact is well shown by the testimony of Mr. Whiteside of the

[1] Hearings before the House Committee on the Judiciary, Trust Legislation Serial No. 2, Patent Legislation Serial No 1, 1912, p. 71. Italics are the writer's.

United Cork and Seal Company, an organization which manufactures bottle caps practically identical with those of the Crown Cork and Seal Company.

MR. WHITESIDE: We do not object to their selling, leasing, or licensing their Jumbo capping machines. That is the only practical capping machine on the market that is fitted for use in large establishments where a good deal of bottling is done. We do not mind their marketing that in any fair way they want to and getting a good, big profit, but we do object to their marketing it and saying that a brewer who takes it cannot use on it any caps except those manufactured and sold by the Crown Cork & Seal Co.

MR. FLOYD: Which is not a patented cap?

MR. WHITESIDE: Which is not a patented cap. . . . . It[1] will be decided so that the Crown Cork and Seal Co. . . . . can sell their Jumbo capping machine and prevent the use of any caps but theirs on it; and it is perfectly easy to see that the risks which a brewer who has one of those Jumbo capping machines incurs in buying caps from us or anybody else who use them on that machine are so great that, practically speaking, he will not buy, if[2] you can find a brewer who is willing to disregard the obligation of the contract which by force or otherwise he has entered into. Some brewers have sufficiently high moral standards to say, "We have made this contract, and whether we like

[1] Refers to Dick case. See *infra*.

[2] This is probably either a misprint or careless statement. It should read "unless." The jumbled wording is as in the original.

it or not we will stick to it"; but even if they have not as high moral standards as that, practically they won't buy any great quantities from us or anybody else.[1]

In his dissenting opinion in the case of *Henry* v. *Dick*, Chief Justice White had occasion to discuss a condition requiring the use of unpatented articles—ink stencils, etc., made by the A. B. Dick Company as a condition of the use of that company's stencil duplicating machines.[2] His succinct statement, in the writer's opinion, clearly established the basis for regarding all conditions of the class C type as unfair:

The patent was solely upon the mechanism which when operated was capable of producing certain results. A patent for this mechanism was not connected in any way with the materials to be used in operating the machine, and certainly the right protected by the patent was not a right to use the mechanism with any particular . . . . operative materials. . . . . It cannot be said that the restriction concerning the use of the materials was a restriction upon the use of the

[1] Hearings before the House Committee on the Judiciary, Trust Legislation Serial No. 2, Patent Legislation Serial No. 1, 1912, pp. 170–71.

[2] The only difference between the bottle-cap case on the one hand and the Dick and Button Fastener cases on the other is that in the former case the use restriction is applied to articles once patented upon which the patents had expired, while in the two latter cases it related to unpatented and unpatentable articles.

machine protected by the patent law. When I say it cannot be said, I mean that it cannot be so done in reason, since the inevitable result of so doing would be to declare that the patent protected a use which it did not embrace.[1]

Since the accepted theory of monopoly in a patent does not and should not embrace a monopoly of unpatented and unpatentable articles, it follows that conditions designed to effect this result are inconsistent with fair competition. Their effect upon both actual and potential competition tends to be precisely the same as that of conditions applying to articles upon which the patents have expired (A and B, above). The results of restrictions of this latter type were well described above in the testimony of Mr. Jones and Mr. Whiteside, and the statements of these gentlemen are equally applicable for illustrating the effect of conditions involving articles which are unpatented and unpatentable.

The Button Fastener and Dick decisions may be regarded as authority for the legality of *use conditions* without reference to whether they involve articles upon which the patents have expired or articles unpatented or unpatentable. From an economic standpoint a decision

[1] 224 U.S. 1. Cf. 52–53.

upholding these unfair conditions cannot be regarded as sound no matter how consistent with judicial precedents it may be. As the writer remarked in his original study of unfair competition, one might well doubt that these cases would stand the test of time. Certainly it was reasonable to suppose that if a change was not made through new judicial interpretation it would sooner or later occur by way of new legislation.[1]

II

D. As previously stated, the "tying" clauses of the Shoe Machinery Company have another aspect than the one just discussed. They may require that a given patented machine must be leased and used in conjunction with the lease and use of another patented machine.

The theory of patents presumes that an inventor deserves a reward for the benefits which he is supposed to have conferred upon society. It is assumed that during the life of the patent the inventor will derive sufficient returns to compensate him for his service. He

[1] Section 5 of the Trade Commission Act and section 3 of the Clayton Act would appear to have overruled these decisions. The Trade Commission has, since this was first written, brought a complaint against the Dick Mimeograph Company under the latter.

may secure his remuneration in a variety of ways. He may, for example, manufacture his patented device and lease or sell it. He may dispose of his patent outright for a definite sum or may sell it in return for a fixed royalty per unit manufactured. But whatever method he may employ, the essential point is that he is entitled to secure such profit from his invention as may be obtainable.

Yet the right to derive profit from an invention is in no sense an absolute right. Another individual may invent a patentable device to perform the same work as the device of the first inventor. In this case the only economic right which the prior inventor has to profits is such as is based upon the free competition of the two articles. Society in the granting of the patents has adjudged that each inventor is deserving of reward. The second inventor is entitled to derive profit from his device as well as is the first from his. Is it not clear that if the first inventor uses any method to close or restrict the market of the second such an arrangement must be regarded as unfair?

The application of these generalizations to the case in point is evident. Assume that, in place of one of the "tied" machines of the United Shoe Machinery Company, a new piece

of mechanism is invented by an individual "X." Assume that the new machine constitutes no infringement of the United's patents, is patentable, and is patented. Assume, thirdly, that the efficiency of the new machine is twice that of the United's machine, the work of which it is designed to perform. As patentee, X is entitled on the basis of the previous assumptions to such profits as his device may earn in free and open competition with the similar machine of the Shoe Machinery Company. In such a situation the relative productive efficiency of the two machines should determine to a nicety the reward belonging to each patentee. But in the presence of the Shoe Machinery "tying" clause no such just distribution is possible. From whence then is X to derive those rewards of which society has judged him worthy? If he manufactures his device, who will buy or lease it? If he desires to sell his patent, who will purchase it?

In the case under discussion the patent law and its construction by the courts have protected one patentee or his assignors in the enjoyment of profits, and prevented another patentee from deriving a legitimate reward for his services. That such a situation is unfair to the second inventor or his assignors is beyond

dispute. The market for later inventions is closed by the "tying" clause and there is no opportunity for competition to develop. At the same time a deadening effect upon inventive capacity results; for few will spend their efforts in invention when legitimate reward is denied or when their remuneration rests within the discretion of a single corporation.

The unsoundness of conditional requirements based upon patents was recognized by the English law of 1907 declaring certain of such restrictions to be in restraint of trade and contrary to public policy.[1]

[1] "It shall not be lawful in any contract made after the passing of this act in relation to the *sale* or *lease* of, or *license to use or work*, any article or process protected by a patent to insert a condition the effect of which will be—

"*a.* to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether *patented* or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor, or his nominees; or

"*b.* to require the purchaser, lessee, or licensee *to acquire* from the seller, lessor, or licensor, or his nominees, any *article or class of articles not protected* by the patent; and any such condition shall be null and void, as being in restraint of trade and contrary to public policy: Provided that this subsection shall not apply if—

"(i) The seller, lessor, or licensor proves that at the time the contract was entered into the purchaser, lessee, or licensee had the option of purchasing the article or obtaining a lease or license on reasonable terms without such conditions as aforesaid; and

"(ii) The contract entitled the purchaser, lessee, or licensee to relieve himself of his liability to observe any such condition

III

E. The Commissioner of Corporations in his report on the International Harvester Company used the term "full-line forcing" to describe "the practice of requiring dealers to order new lines[1] . . . . as a condition to retaining the agency for some brand of the company's harvesting machines."[2]

on giving the other party three months' notice in writing and on payment in compensation for such relief in the case of a purchase of such sum, or in the case of a lease or license of such rent or royalty for the residue of the time of the contract as may be fixed by the arbitrator appointed by the Board of Trade."—7 Edw. VII, ch. 28, p. 126, ch. 29, p. 153. Cf. *Sarason* v. *Frénay*, L.R. (1914) 2, ch. 474. All italics are the writer's.

Australia and New Zealand have similar provisions against "tying" clauses. A careful examination of the patent laws of these countries will reveal how far behind the United States is in affording protection to the public against unreasonableness on the part of patentees.

[1] By the gradual acquisition of various concerns in the years subsequent to organization the International secured certain new lines. Among these concerns were plants for the manufacture of farm wagons, manure spreaders, and plows. In addition it began the production of gasoline engines in 1904, cream separators in 1905, and tractors in 1909.

[2] *Report of the Commissioner of Corporations on the International Harvester Company*, p. 306. The report states that complaint of this practice came to the Bureau from a number of independent dealers and manufacturers. It is supported by the extracts drawn from the record in the case of the *United States* v. *International Harvester Company* and cited in the government's brief. For example, Claypool, general agent, wrote Perrot, one of the blockmen, February 3, 1912, regarding the approval of two commission agency contracts sent in by the latter: "How about

F. A restriction of similar character was alleged by the government to have been enforced by the American Coal Products and Barrett Manufacturing companies. These concerns are supposed to have a very substantial control of the supply of pitch made from coal tar. Some purchasers and users of roofing materials have been required to buy one ton of felt for every two tons of pitch. Naturally such individuals would be unlikely to purchase tarred felt[1]

manure spreaders, wagons, cream harvesters [*sic*], engines, tillage implements, etc.? . . . . If these two dealers will not take hold of our other lines, it will be necessary, for our own protection, to make other arrangements." Cf. brief for the United States, *United States* v. *International Harvester Company*, U.S.D.C. for the District of Minnesota, p. 124; cf. also *ibid.*, pp. 123 and 125. In justice to the Harvester Company it should be said that it introduced a good deal of testimony, all tending to prove that the charge of full-line forcing was untrue. Cf. appendix to defendant's brief, evidence as to certain points abstracted and topically arranged, *United States* v. *International Harvester Company*, *cit. supra*, pp. 382 ff. But it is also true that the assistant general manager of the International admitted that "full-line forcing" had been used (*Report of the Commissioner of Corporations on the International Harvester Company*, *cit. supra*, p. 309), though claiming that it was not to be regarded as a policy of the company but rather as an unauthorized act of salesmen with a view to increasing sales.

[1] Petition, *United States* v. *American Coal Products Company* *cit. supra*, p. 30. It should be noted that this practice was enjoined by Judge Holt in a decree entered March 14, 1913, on the consent of the defendants to reform their organization. As the defendants denied this and other violations of the Sherman Act set forth in the complainant's bill, the charge mentioned should be regarded simply as an allegation.

elsewhere for those operations in which such pitch was used.

G. The manufacturer's license agreement of the Motion Picture Patents Company contains the following clause:

> The Licensor[1] hereby grants to the Licensee[2] . . . . the right and license . . . . to manufacture, print and produce positive motion pictures . . . . upon condition that they be used solely in exhibiting or projecting machines containing the inventions, or some of them of said letters patent . . . . and licensed by the Licensor. . . .[3]

It is probably clear that in this case the Motion Picture Patents Company, by virtue of its film control, has endeavored to compel the use of motion-picture machines containing one or more of the patents which it controls.

The purpose and effect of all conditions in the third group are readily seen. To a greater or less

[1] Motion Picture Patents Company.

[2] Biograph Company.

[3] License agreement under the camera and film patents between Motion Picture Patents Company and Biograph Company, December 18, 1908, section (*f*), clause 1. Original petition, *United States* v. *Motion Picture Patents Company*, U.S.D.C. for the Eastern District of Pennsylvania, Exhibit 3, p. 55. Agreements with other manufacturers contained the same clause. From its phrasing it might appear that the restriction in question was based upon a patent. As a matter of fact such is only nominally the case. The basic patent of the Motion Picture Patents Company (Revised Letters Patent 12192) relates only to the negative film. The positive films which are printed and developed from the negative films and sometimes copyrighted

degree all restrict the market of either actual or prospective competitors, or both. Consider for a moment the tendency of "full-line forcing." A dealer who is compelled to take a new line in this fashion may and frequently does give up his agency for an independent line of the same goods which he has been carrying in the past. It has been claimed, moreover, that in addition to requiring the handling of other products as a condition of handling those desired by a dealer, Harvester Company salesmen have endeavored to overload the dealer, thereby rendering it impracticable that he order similar goods from other makers. The effect of this practice upon the trade of other manufacturers would be similar to that which occurs when dealers are compelled to handle one line exclusively.[1]

are those used for exhibition purposes. The weight of judicial decision is to the effect that the control of a patentee does not extend to the product of a patented article "unless new in a patentable sense." There is therefore no distinction in principle between this condition and E and F above. The Motion Picture Patents Company has endeavored by virtue of its large control of films to compel the use of its exhibiting machines, instead of those of its competitors. The fact that the Patents Company happened to control certain patents upon motion-picture machines is merely incidental. The basis of the restriction is a large control of the film business, precisely as the basis of E above is the large control of harvesting machinery, or F above the large control of the pitch business.

[1] Cf. next chapter.

While there is theoretically no sound reason why anyone should not undertake the manufacture of tarred felt for roofing purposes, one who does so is not long in discovering that the market is not a free and open one. If, as alleged, the Coal Products and Barrett people, controlling a considerable proportion of the output of pitch, require that one ton of felt must be purchased from them for each two tons of pitch, the manufacturer of tarred felt will be limited in his sales to such parties as purchase from independent pitch producers.

Theoretically the inventor of a new motion-picture machine should derive large returns therefrom, considering the vast extent of the motion-picture business. Actually his reward might be insignificant, since a free and open market is denied him through the fact that would-be purchasers of his machine are restrained from obtaining films from the licensed manufacturers unless they are to be used upon machines embodying the patents controlled by the Motion Picture Patents Company.[1]

[1] At the time the suit was brought by the United States against the Motion Picture Patents Company the licensee manufacturers of that organization were alleged to produce between 70 and 80 per cent of the motion-picture films annually manufactured in the United States.

Economically fair competition would seem to demand that no dealer or organization should be required to handle a line of goods unless desiring to do so; that none should be compelled to purchase goods from one organization if preferring to purchase them from another; and that no person should be forced to use one make of a machine if he prefers to use another. The only methods that should be open to a concern in marketing its products are the economically fair methods. If salesmanship, prices, and quality of goods or similar bases of sale then fail to secure results for a given manufacturer, there is every reason to suppose that competing organizations possess equal or superior efficiency in some one or more of these respects. It follows, therefore, that any conditional requirements which attempt to check or destroy this latter competition are unfair to these presumably efficient manufacturers. The fact that a manufacturer may produce a better article or may sell it at a lower price may be of little advantage to him when conditional requirements are used. In spite of these things, he may be prevented from developing his business to the extent to which his economic efficiency entitles him, from securing that business which would

undoubtedly be his under conditions of economically fair competition. Nor should the effect of such restrictions upon potential competitors be overlooked. It is difficult to believe that capital will readily enter a field of business where conditional requirements exist, if aware in advance of restrictions which either partially or entirely close the market to the products of the projected undertaking.

CHAPTER V

EXCLUSIVE ARRANGEMENTS[1]

Exclusive arrangements may be defined as arrangements which require that certain dealings or transactions shall be confined exclusively to a specified organization or organizations.[2]

[1] Exclusive arrangements exist in the deferred-rebate plans of various steamship conferences. It has been deemed advisable, however, to consider such arrangements in connection with a discussion of rebates, which is to follow.

[2] A clear line of demarkation does not exist between exclusive arrangements and the conditional requirements discussed in the preceding chapter. It will be readily understood that conditional requirements are often necessarily exclusive in their character. For example, the contract offered by the Electric Lamp Combination provided that tungsten- and tantalum-filament lamps would be supplied to jobbers agreeing to purchase *all* their carbon-filament lamps from the combination. Clearly this is an arrangement requiring organizations to purchase exclusively. On the other hand, a conditional requirement is not inevitably exclusive. Thus the alleged Barrett restriction requiring every purchaser of two tons of pitch to purchase also one ton of tarred roofing felt is not by its terms exclusive. It does not require purchasers of pitch to purchase *all* their roofing felt of the Barrett concern, and, so far as the words of the arrangement are concerned, there is nothing to prevent an organization from purchasing roofing felt elsewhere. While it is necessary to admit that the actual effect of such an arrangement might be to cause buyers of pitch to confine their purchases exclusively to the Barrett Company, yet in terms there is nothing requiring such action, and under a variety of circumstances conditional requirements might conceivably be non-exclusive.

As commonly used they may be divided into three classes:[1]

A. Arrangements which require that organizations shall use exclusively.

B. Arrangements which require that organizations shall sell exclusively.

C. Arrangements which require that organizations shall purchase exclusively.

The purpose of all restrictions of this type is substantially the same, i.e., to obtain as much business as is possible for those concerns imposing them.

A. Arrangements of the first class are frequently required by the licensor of a patented device from his licensee. The best illustration is the United Shoe Machinery Company. This corporation in its leases has used two types of clauses of this character which have been denominated the "exclusive-use" clause and the "prohibitive" clause respectively. Both have been designed to restrict manufacturers to the use of the machines leased from the United Shoe Machinery Company.

The "exclusive-use" clause for lasting and tacking machines runs as follows:

(*c*) If at any time the lessee shall fail or cease to use *exclusively* lasting machinery held by him under lease

[1] It is presumably clear that other exclusive arrangements might also be made, such as exclusive leasing, etc.

from the lessor for lasting all boots, shoes, and other footwear made by or for him, which are lasted by the aid of machinery, or shall fail or cease to use *exclusively* tacking mechanisms and appliances held by him under lease from the lessor, for doing all work in the manufacture of all boots, shoes, and other footwear made by or for him which is done by the aid of tacking mechanism and appliances, the lessor, although it may have waived or ignored prior instances of such failure or cessation, may at its option terminate forthwith by notice in writing any or all leases or licenses of lasting machines, lasting machinery, lasting mechanisms, or lasting devices, then existing between the lessor and the lessee, whether as a result of assignment to the lessor or otherwise; and the possession of and full right to and control of all lasting machines, lasting machinery, lasting mechanisms, and lasting devices, the lease or license of which is so terminated shall thereupon revest in the lessor free from all claims and demands whatsoever.[1]

The "prohibitive" clause reads that:

(*d*) The leased machinery shall not nor shall any part thereof be used in the manufacture or preparation of any welted boots, shoes, or other footwear or portions thereof which have been or shall be welted in whole or in part, or the soles in whole or in part stitched by the aid of any welt-sewing or sole-stitching machinery not held by the lessee under lease from the lessor, or in the manufacture or preparation of any turned

[1] Exhibit 21, lease for No. 5 lasting machine, record, *United States* v. *United Shoe Machinery Company*, U.S.D.C., District of Massachusetts, Vol. IX, pp. 187–88. Quoted in government's brief, pp. 72–73. Italics are the writer's.

boots, shoes, or other footwear or portions thereof the soles of which have been or shall be in whole or in part attached to their uppers by the aid of any turn-sewing machinery not held by the lessee under lease from the lessor, or in the manufacture of any boots, shoes, or other footwear which have been or shall be in whole or in part pulled over, slugged, heel seat nailed, or otherwise partly made by the aid of any pulling-over or "metallic" machinery not held by the lessee under lease from the lessor.[1]

The "exclusive-use" clause appears in twenty-two lease forms of the United Shoe Machinery Company and the "prohibitive" clause in twenty-seven.[2] Their restrictive effect is shown in the experience of Mr. Alexander Stone, of the Atlas Works of Leipzig, Germany, who came to this country to make an attempt to instal machines manufactured by his company. He remained here nearly six weeks and succeeded in selling only two machines, both of which were used for putting on wooden heels. According to his testimony Jackson Roberts, of Roberts, Johnson & Rand, said to him:

My boy, I know all about it, about the machines you are producing in Germany and what kind of

[1] Exhibit 21, lease for No. 5 lasting machine, record, *United States* v. *United Shoe Machinery Company*, U.S.D.C., District of Massachusetts, Vol. IX, p. 185, quoted in government's brief, p. 73.

[2] Résumé of leases in brief for the United States, *ibid.*, pp. 138–46.

machines can be made in Germany or in Europe; but as it is, you know, if you bring over a machine which is constructed in such a way that we drive a cow into it, and on one side the ready-made shoes come out, and on the other side the ready-made sausages, and you want to sell it to us for ten cents, then we are not allowed to install it or make any use of it.[1]

B and C. That in some cases an exclusive purchasing and in others an exclusive selling arrangement is resorted to may in all probability be ascribed primarily to differences in marketing methods. When a given organization sells its products to intermediaries who in turn resell to the consumer, it seems to be immaterial whether an exclusive purchasing or an exclusive selling arrangement is used. If a dealer is compelled to sell exclusively the products of one organization, he must obviously make his purchases exclusively from the said organization also. Conversely, if a dealer is forced to purchase certain products from one organization exclusively, it is equally evident that he must also sell the products of that organization exclusively. On the other hand, if an organization sells its products direct to the consumer,

[1] Alex. Stone, record, *ibid.*, Vol. IV, p. 1674, quoted in government's brief, p. 190. He further testified that statements to a similar effect were made by other manufacturers.

there can be no possible advantage in demanding an arrangement for exclusive selling, since the consumer has no intention of reselling the goods. Exclusive purchasing arrangements alone, therefore, will very likely be found in a majority of cases where organizations sell their products directly to the consumers thereof.

Many factors' agreements, possibly the larger proportion of them, contain a clause requiring either exclusive purchasing or exclusive selling.[1] For this reason, more than for any other, such arrangements have been denounced as destroyers of competition and agents of monopoly. Thus the factors' agreement of the American Tobacco Company, dated October 1, 1895, contained the following clause:

> Eleventh. Upon your acceptance in writing of the terms and conditions of this agreement, you understand and agree that you will handle our cigarettes exclusively. . . . . [2]

[1] The fact should not be lost sight of that these clauses are merely written manifestations of the arrangements themselves. They are in no sense necessary to exclusive selling or purchasing, for these things can be secured without any written contract.

[2] Report and proceedings of the joint committee of the Senate and Assembly appointed to investigate trusts, state of New York, Senate Document No. 40, 1897, p. 881.

Later the Continental Tobacco Company enforced contracts requiring dealers not to sell or purchase the goods of competitors.[1]

Another exclusive clause not of recent origin may be quoted from the factors' agreement of the National Wall Paper Company:

> 3. The purchaser exclusively guarantee [*sic.*] and agree [*sic*] that between September 1, 1896, and June 30, 1897, will not purchase or acquire any wall paper or hangings the product of any person or corporation other than the company. . . . .[2]

At a subsequent date the Continental Wall Paper Company required all wholesalers and jobbers to sign an agreement containing a clause which read as follows:

> It is agreed . . . . That the company will sell . . . . and the jobber will purchase, the entire requirements of the jobber in his business of selling wall paper for the business year ending July 1, 1899.[3]

In past years the Photographic-Supplies Combination has also enforced exclusive sales arrangements. The government claimed that even at the time its suit was brought the Eastman Kodak Company of New York would not

[1] Cf. chap. vii, *infra*.

[2] New York Senate Document No. 40, 1897, *cit. supra*, pp. 804–5.

[3] Up to a certain specified amount. *Continental Wall Paper Company* v. *Lewis Voight & Sons Co.*, 148 Fed. 939; cf. 945.

sell any of its line of goods, patented or unpatented, to any independent retail dealer who handled a line of goods manufactured and marketed by its competitors.[1] The following quotation indicates the conditions formerly prevailing in this industry:

Q. [By Mr. Clarke.] Now, suppose that a dealer handling Mr. Carbutt's paper wanted some other article—say a camera, for example—from the Eastman Kodak Company; could that dealer procure it?

A. Why, I doubt whether the Eastman Kodak Company would sell that dealer unless he were handling their whole line exclusively. I do not think they would care to sell him unless he would confine his energies to their line.[2]

The Pottery Association of 1904 by a clause in its contract offered inducements[3] to dealers to comply with certain conditions among which

[1] Petition, *United States* v. *Eastman Kodak Company, cit. supra*, p. 34. The Eastman Kodak Company of New York conducts the business of manufacturing, selling, and shipping articles used in the photographic-supply business. Its capital stock is owned by the Eastman Kodak Company of New Jersey, a stockholding corporation organized in 1901, which also holds the stock of Kodak, Ltd., of London, England, and Canadian Kodak Company, Ltd., a corporation of the Dominion of Canada.

[2] C. S. Abbott, *Report of the United States Industrial Commission on Trusts and Industrial Combinations* (second volume on this subject), Vol. XIII, p. 198.

[3] Cf. next chapter.

was one providing that "purchases or receipts of all domestic premium wares[1] . . . . during the year 1904 must be confined to members of the Pottery Association." This organization embraced upward of 80 per cent of the pottery manufacturers in the United States.[2]

Until 1905 the commission-agency contracts of the International Harvester Company contained a clause which required a dealer under penalty to handle exclusively the harvesting machinery of that organization.[3] In that year, however, these clauses were eliminated. At the time anti-trust proceedings against the

[1] Defined by another article as including only dinner and toilet ware.

[2] *Morony Hardware Company* v. *Goodwin Pottery Company*, 120 S.W. 1088. Cf. pp. 1089–90.

[3] The following is a typical clause of this character: "Such agent especially agrees not to accept the agency for or to be interested in the sale of any grain binder, header, corn binder, husker and shredder, reaper, mower, stacker, sweep rake, hay rake, or hay tedder, other than those manufactured by the International Harvester Company, either directly or indirectly, nor to permit anyone acting for him as employee, agent or partner, so to do while acting as agent for the said company under this contract, and said agent agrees to pay such company on demand as liquidated damages, twenty-five dollars for each grain binder, header, or corn binder; fifty dollars for each husker and shredder; ten dollars for each mower, reaper or stacker; five dollars for each sweep rake, hay rake, or hay tedder sold in violation of this paragraph of this contract."—*Report of the Commissioner of Corporations on the International Harvester Company* p. 304.

company were pending in several states. In the state of Texas the clauses were dispensed with three years earlier. In no case have they been restored.[1] The Harvester Company emphatically denied in its brief that it had ever attempted to compel dealers to handle its goods exclusively. To prove this point it secured the testimony of a large number of witnesses.[2] Against this evidence one must, however, weigh the following extract from a circular letter of instruction written on November 11, 1904, by R. C. Haskins, the then head of its domestic-sales division:

> There has been some discussion lately on the subject of the exclusive feature of our commission contract, and we desire at this time to state the principle that will govern in this matter. Where we furnish goods to an agent for sale on a commission or consignment contract, *our interests demand that such articles be handled solely on an exclusive basis.*[3]

A very recent case of an exclusive arrangement is to be found in the so-called "jobbers'

[1] *Report of the Commissioner of Corporations on the International Harvester Company*, p. 304.

[2] Statement, brief, and argument for defendants, *United States* v. *International Harvester Company*, *cit. supra*, pp. 102 ff., and also appendix to defendants' brief, *ibid.*, pp. 382 ff.

[3] Brief for the United States, *ibid.*, pp. 127–28. Italics are the writer's.

license agreement"[1] of the recently dissolved Bathtub Trust. This document contained the following clause:

10. The Purchaser[2] also agrees during the life of this contract not to purchase, sell, advertise, solicit orders for, or in any way handle or deal in Sanitary Enameled Iron Ware of any manufacturer *not licensed* . . . . except with the express written permission of the Licensor.[3]

The Keystone Watch Case Company did not apparently follow the policy of requiring jobbers to sign agreements providing for exclusive purchase or sale. None the less it seems to have been the policy of this organization to insist that these distributors conduct their business on an exclusive basis. On January 15, 1910, there was mailed a *delicately* worded letter to

[1] The term "license agreement" is rather a misnomer as implying the permission to manufacture or sell a patented article. The agreement in question, in addition to the exclusive-sales arrangement, provided for the maintenance of prices upon sanitary enameled ironware, which was absolutely unpatentable in itself, although in its manufacture a patented tool was used. The contention of the combination was that the protection of the use of the patent constituted sufficient ground for the creation of the combination and of its various agreements. As this view was denied by the court the term "license agreement" is inappropriate in this connection. Cf. 226 U.S. 20. Cf. 48-49.

[2] The jobber.

[3] Record, *United States* v. *Standard Sanitary Manufacturing Company*, U.S.D.C. for the District of Maryland, Vol. II, p. 37. Italics are the writer's.

the jobbing trade intimating the wishes of the company in this and other matters. The section of this letter relating to exclusive arrangements reads as follows:

Fourth. And further, we desire that the jobbers to whom we sell our goods bearing the following trademarks, to wit, *Howard*, *Boss*, *Crescent*, *Planet*, *Crown*, *Silveroid*, and *Excelsior* shall not deal in any watch cases other than those manufactured by us.[1]

The Cleveland Stone Company is alleged to produce and sell from 80 to 90 per cent of the domestic production of grindstones. As not more than 12 to 15 per cent of the total number of grindstones sold in this country are imported from abroad, this organization sells in consequence about 75 per cent of our total consumption of grindstones. All sales are made to jobbers and to jobbers only. The company requires that each jobber handling its goods shall enter into an agreement with it not to handle the goods of any other concern. It also refuses to deal with jobbers who handle to any extent the products of one or more of its competitors.[2]

[1] Petition in equity, *United States* v. *Keystone Watch Case Company*, U.S.C.C. for the Eastern District of Pennsylvania, p. 15. For further details cf. *infra*, chap. x.

[2] Petition in equity, *United States* v. *Cleveland Stone Company* U.S.D.C. for the Northern District of Ohio, pp. 19–20.

The consequences which flow from the enforcement of arrangements of the character described may be well illustrated by the cases of the Bathtub and Photographic-Supplies combinations. It was estimated by Mr. Wayman that 80 per cent of the total furnace capacity of the country was controlled by the sanitary enameled ironware manufacturers who joined the former combination.[1] At the same time all the jobbing trade except about 12 per cent[2] signed the "jobbers' license agreement" containing the exclusive clause previously quoted. In consequence the market of 20 per cent of the production of the country, based on furnace capacity, was limited to 12 per cent of the total number of jobbers, for jobbers who signed the agreement were obligated to purchase *exclusively* from licensed manufacturers.[3] All of

[1] Edwin L. Wayman, record, *United States* v. *Sanitary Manufacturing Company, cit. supra*, Vol. I, p. 69.

[2] All the principal jobbers of plumbing supplies in the United States are listed in the "Blue Book" of the plumbing trade, known officially as "List of Jobbers of Plumbing Supplies in the United States," and dated July, 1910. Only 49 out of the 387 jobbers on this list, or about 12 per cent, refused to sign the agreement. Forty-eight jobbers not mentioned in the "Blue Book" also signed. Assuming the ratio of signers to non-signers to be the same among jobbers not listed in the "Blue Book" as among those who were, the percentage of the total number of jobbers who failed to sign would be about that stated.

[3] Licensed manufacturers were those who signed the agreement which was the basis of the combination.

them, therefore, who kept this condition of the agreement must in consequence cease to purchase from such independents as refused to join the combination and thus become licensed manufacturers. The testimony given by John A. Kelly illustrates this point admirably. Mr. Kelly was a manufacturer who, believing the Bathtub Combination to be illegal, emphatically refused to join it, although strongly urged to do so.

Q. Did some of the jobbers who had bought goods of you prior to June 6 decline to buy thereafter?

. . . . . .

A. Yes, sir.

Q. Did they assign any reason?

A. Yes, sir.

Q. What was the reason?

A. Because we did not sign the license agreement.[1]

The operation and effect of the exclusive selling clause contained in the contracts of the Photographic-Supplies Combination is indicated in the testimony of W. B. Dailey. Mr. Dailey was a manufacturer of photographic paper in competition with the combination. After relating instances where dealers were cut off by the combination for failure to sell

[1] John A. Kelly, record, *United States* v. *Sanitary Manufacturing Company, cit. supra*, Vol. I, p. 231.

exclusively, he said, referring to one of these dealers:

> . . . . He put up about as game a fight as anybody could for nearly a year. But, finally, it was the same thing with him. He said to himself, "I am losing money; there is no use talking; I have fought it hard this year, but I cannot get the goods to sell; the paper alone is not enough." So he had to give in, and so it has gone in a number of cases.

Later Mr. Dailey remarked that the only way it was possible for himself and other manufacturers to compete was by selling direct to the consumer.[1]

It would seem to be a cardinal principle of fair competition that every organization should be allowed to market its goods freely upon the basis of their quality and its own productive and selling efficiency. If under such conditions a business does not expand or if it loses ground, the reasons therefor must be sought within the organization itself. They must be looked for in the quality of the goods, in their prices, or in the organization and management of the various departments of the concern. On the other hand, if exclusive arrangements are insisted upon and enforced, it would appear that a

[1] *Report of Industrial Commission*, Vol. XIII, *cit. supra*, pp. 184–85.

competing business might fail to develop or might be unable to hold its own without being in any way responsible therefor. It is also clear that the wide extension of such arrangements by some organizations would, as in the case of conditional requirements, constitute a powerful deterrent to prospective competition.

Many arguments have been advanced to prove the necessity of exclusive arrangements, and some of them have found a too ready acceptance. It is asserted, for example, that it is necessary to compel the dealer to sell exclusively in order to insure that goods will be properly pushed by him. Such a view would seem in itself a confession of weakness. It would appear to be an acknowledgment of the fact that there may be equally good or better commodities of the same character upon the market at an equivalent or lower price. If such a situation exists, it would seem that the exclusive arrangement violates the principle of fair competition between these commodities. If an organization is so efficient that it manufactures articles of a quality equal to or better than those of another organization and markets them at a price equally as low or lower than those of the other, it does not require exclusive arrangements to insure that its goods will find a market.

In consequence no organization should be allowed to enforce this kind of an arrangement which may, as indicated, hinder an efficient organization from obtaining a market for its commodities.

Still another view of the necessity of exclusive arrangements is expressed by a well-known business man who wrote to President Wilson as follows: "If a new concern cannot grant to one party or store in a certain territory an exclusive agency for its goods with a distinct understanding that the same will not handle any competing goods, the goods of a new concern in most lines of business will never stand a ghost of a show."[1] Although this is the statement of a business man of long experience, his conclusion may be doubted. In the first place, there has been a tendency to confuse exclusive purchasing, selling, and similar arrangements on the one hand with what may be termed exclusive territorial arrangements on the other. The two are not the same. A purely exclusive territorial arrangement merely gives to a dealer or agent the right to sell the goods of a given organization within a certain territory without competition from other dealers or agents of the

[1] Copy of the letter of D. E. Felt to President Wilson, dated May 30, 1914. Mr. Felt was kind enough to supply the present writer with a copy.

same organization. This is a very different thing from requiring that the said dealer or agent shall purchase or sell *only* the goods of the organization in question. In other words, the two arrangements are entirely distinct, although they may be coupled with each other.[1]

It is very doubtful if the allotment of exclusive territory is not entirely sufficient to permit the introduction of new commodities. It is equally doubtful if an exclusive selling or purchasing arrangement is necessary to secure this result, as Mr. Felt would have us believe. Even if this were not the case, exclusive arrangements might none the less be regarded as economically unjustifiable. As this section has attempted to demonstrate by citing actual instances, such arrangements not only handicap existing competitors, but also deter prospective competitors. The possible disadvantages arising from the use of these arrangements,[2] as indicated by the cases of the Shoe Machinery,

[1] Cf. *Federal Trade Commission Conference Rulings Bull. No. 1*, various decisions relating to exclusive territorial arrangements.

[2] The writer is of the opinion that such exclusive arrangements as operate unfairly are within the scope of section 5 of the Trade Commission Act. In addition, section 3 of the Clayton Act specifically declares unlawful certain classes of exclusive conditions "where the effect . . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Kodak, and Bathtub combinations, might conceivably outweigh the possible economic advantages to the introduction of new lines. To permit an organization introducing a new line to use exclusive purchasing and selling arrangements is equivalent to granting to it permission to handicap and restrict other organizations attempting to compete with it at any future time, and such a proposal should be regarded as economically unsound.[1] The offer of exclusive territory by a manufacturer is ordinarily quite sufficient to secure him adequate channels of distribution. It is doubtful if he would obtain either more numerous or better agents by imposing exclusive arrangements upon them. On the contrary, it is not unreasonable to assume that insistence upon such arrangements would in some cases prevent the manufacturer from procuring the best agents.

Another not uncommon argument made in favor of exclusive arrangements is that if such requirements were abolished or prohibited,

[1] Another situation ought not to be overlooked. In many cases it might be impossible for an organization manufacturing a new competing article to enforce exclusive arrangements because of the fact that it does not manufacture an entire line of articles or goods but only some one or other of the commodities comprising the line. Cf. the statement of Mr. Dailey, above, regarding the situation in photographic paper.

purchasers could not protect themselves against the fluctuations of the market by means of long-term contracts. One who makes this contention however overlooks the fact that a long-term contract of purchase is not necessarily exclusive in character. In the past, concerns could usually be found which would agree to supply purchasers under long-term contracts containing no such features. Conditions of this type therefore are not an essential part of such contracts and it may be doubted that they add anything to the protection of the customer thereunder. In other words, if exclusive arrangements generally were abolished there would be but little reason for assuming that purchasers would be unable adequately to protect themselves against market fluctuations.

In view of these facts, there is seldom, if ever, any economic necessity that long-term contracts should be exclusive.

CHAPTER VI

BLACK LISTS, BOYCOTTS, WHITE LISTS, ETC.

The title of this chapter conveys so adequately the meaning of the practices discussed that no definition of them is required. In some cases lists of dealers to whom goods should not be sold have been circulated generally through the trade. In others, lists of dealers who might be sold have been similarly distributed. In yet other instances manufacturers appear to have blacklisted certain organizations, since these have been consistently refused supplies of goods.

Most of the cases of blacklisting and boycotting which the writer has been able to discover are in connection with the operations of various wholesale and retail trade organizations. In these cases such methods usually develop out of the practice known as classification, a term which requires some explanation. As indicated by the writer elsewhere,[1] there has appeared for some years past a noticeable trend toward the creation of a presumably more economic system in the distribution of commodities. This tendency has manifested itself in the

[1] *American Economic Review*, III (September, 1913), 555.

increasingly large number of articles which are disposed of without the assistance of middlemen, either the wholesaler or the retailer, or both, being dispensed with. It has also been accompanied by the rise of the chain store and mail-order establishment. As a result of these developments the interests of the wholesalers or jobbers and the retailers are to a certain extent in harmony, in that they both desire to prevent shipments directly from the manufacturer to the consumer. In addition, the retailer may generally be said to be interested in preventing any shipments from the wholesaler or jobber to the consumer,[1] while in some cases the wholesaler or jobber is equally interested in preventing shipments from the manufacturer to the retailer. In addition, the rise

[1] This situation is indicated in the following quotation taken from the Boston agreement of the lumber trade associations: "Second. That the National Wholesale Lumber Dealers' Association take up and consider the pronounced and recognized evils from which both branches ['both branches' means wholesale and retail] are suffering, viz:

"1. Sales by manufacturers and wholesalers to consumers.

"2. Sales by brokers, agents, and commission men to consumers.

"3. Sales and quotations by the so-called retail dealers to consumers, through agents, and by methods used by the wholesaler in soliciting trade from retailers."

Cf. original petition, *United States* v. *Eastern States Retail Lumber Dealers' Association*, U.S.C.C. for the Southern District of New York, Exhibit F, p. 81.

of the mail-order houses, co-operative associations, and similar organizations by means of which the middlemen's charges are eliminated, has interested certain associations in preventing shipments to these types of organization either entirely or except at prices higher than those made to ordinary retailers.

Classification may be said to be one of the steps in the attempt to confine trade to what the various wholesale and retail associations regard as its legitimate channels, i.e., from manufacturer to wholesaler, to retailer, to consumer; and measures have been taken and rules formulated to classify the trade into these four groups: manufacturers, wholesalers, retailers, and consumers.[1] The usual method is the use of more or less arbitrary definitions of each one of these terms,[2] and the standing of any concern in the trade is based upon the classification adopted. Mail-order houses, co-operative associations, and other large direct sellers are usually classed as consumers and, regardless

[1] Sometimes there may be another group, as brokers and commission men, who are usually separately classified and have a definite standing.

[2] On classification compare the following proceedings: Bill of complaint, *United States* v. *Colorado and Wyoming Lumber Dealers' Association*, U.S.C.C. for the District of Colorado, Eighth Judicial Circuit, pp. 10 ff.; original petition, *United*

of the quantity purchased, are entitled only to consumer prices.

Let us examine briefly the manner in which this classification is applied. In the first place, several trade associations publish trade lists known by various titles as "Red Books," "Green Books," or "Blue Books." In these lists are published the names of all individuals, firms, and corporations regarded by the trade (in accordance with the rules of classification mentioned) either as wholesalers or retailers, as the case may be. Such a list of retailers would indicate to manufacturers or wholesalers those concerns which were regarded by the trade as the legitimate customers of either or both. A list of wholesalers or jobbers would give a similar indication to the manufacturer. Only those individuals and concerns appearing in such lists (or in separate classification sheets issued by some organizations) are usually entitled to obtain goods at the trade discounts which are allowed the different classes. Ob-

States v. *Edward E. Hartwick*, U.S.C.C. for the Eastern District of Michigan, Southern Division, pp. 11 ff.; decree of injunction, *United States* v. *Southern Wholesale Grocers' Association*, U.S.C.C. for the Northern District of Alabama, pp. 4 ff.; petition in equity, *United States* v. *Pacific Coast Plumbing Supply Association*, U.S.C.C. for the Southern District of California, pp. 12 ff.; petition, *United States* v. *Eastern States Retail Lumber Dealers' Association*, *cit. supra*, pp. 18–56.

viously the "Red," "Blue," and "Green" books operate as a fair list. Concerns not listed are of two classes: first, those which are not regarded by the trade as legitimate wholesalers or jobbers on the one hand, or as legitimate retailers on the other, including usually mail-order houses and all other direct-selling organizations; second, those concerns ordinarily entitled to be classified but whose names may have been removed from the list because of some violation of so-called trade ethics.

A second way in which a trade association may work out its intention to confine trade to certain channels is by the use of recommended lists. Thus a retail association might issue lists of wholesalers or of wholesalers and manufacturers from whom its members might buy. Shipments made directly to consumers by such concerns would, when discovered, be reported to members of the association; and the implication drawn from such reports would be that association members should cease trading with the offending concerns. Such reports also have often contained a list of previous offenders who have been restored to good favor. Generally speaking, this restoration has been conditional upon the payment of a fine by the

offending member. An illustration of this practice is shown in the following circular:

OFFICIAL REPORT OF THE EASTERN STATES RETAIL LUMBER DEALERS' ASSOCIATION, 18 BROADWAY, NEW YORK, N.Y.

Statement to members, April, 1909.—You are reminded that it is because you are members of our association and have an interest in common with your fellow members in the information contained in this statement, that they communicate it to you, and that they communicate it to you in the strictest confidence and with the understanding that you are to receive it and treat it in the same way.

The following are reported as having solicited, quoted, or as having sold direct to the consumers:

[Here follow the names of several score concerns.]

REMOVED SINCE LAST REPORT

[Here follow the names of fifteen concerns.]

Members upon learning of any instance of persons soliciting, quoting, or selling direct to consumers should at once report same, and in so doing should, if possible, supply the following information: The number and initials of car, the name of consumer to whom car is consigned, the initials or name of shipper, the date of arrival of car, the place of delivery, the point of origin.[1]

[1] Original petition, *United States* v. *Eastern States Retail Lumber Dealers' Association, cit. supra*, Exhibit U, pp. 98–100. A number of similar circulars and letters might be quoted. In this connection and on this general subject cf. petition, *United*

It is submitted that these acts on the part of trade associations must be regarded as unfair competition. Economically fair competition demands that no manufacturer or dealer shall be arbitrarily restricted as to his customers at the dictation of some group, since the efficiency of competitors of the concerns composing such a group is thereby hampered and restricted. It may well be true that various trade associations deserve at least some measure of protection against so-called illegitimate trading. Indeed, the day may conceivably come when it will be recognized that some form of classification is economically sound, but it is certain if it does that such classification must be regulated, controlled, and supervised by some governmental authority. Under no circumstances should an association or similar organized group be permitted arbitrarily to

States v. *Eastern States Retail Lumber Dealers' Association, cit. supra,* Exhibits J, K, L, O, S, T, W, X, Y, and Z, pp. 88 ff.; petition, *United States* v. *Willard G. Hollis,* U.S.C.C. for the District of Minnesota, Exhibit A, p. 69; decree of injunction, *United States* v. *Southern Grocers' Association, cit. supra* p. 5; petition, *United States* v. *Plumbing Association, cit. supra,* pp. 12–14; petition in equity, *United States* v. *Master Horseshoers' National Protective Association of America,* U.S.D.C. for the Eastern District of Michigan, Southern Division, pp. 18 ff.; petition in equity, *United States* v. *Philadelphia Jobbing Confectioners' Association,* U.S.D.C. for the Eastern District of Pennsylvania, pp. 5–9.

blacklist and boycott concerns because the latter sell to competitors of its members.

Another side of this question is, of course, the fact that the development of the methods here discussed has, to a considerable degree, been due to the growth of larger units of selling organization: the large retailer; the chain store; the department store; the mail-order house, and also the co-operative association. To a considerable extent the object of such methods has been to prevent the economic efficiency of these larger units from obtaining full play. Hence the economic soundness of classification even under government supervision as suggested is open to dispute. Many persons undoubtedly believe that the present system of distribution is uneconomic and that the development of the larger units of organization is a necessary and desirable step in the direction of greater distributive economy. Their theory is that the enormous increase in the number of middlemen and persons engaged in marketing[1] is largely responsible for the high cost of living. If the economic efficiency of the larger units is allowed to operate freely, many of these middlemen will be eliminated. They hold, therefore, that the imposition of artificial

[1] Cf. Harry Tipper, *The New Business*, pp. 88 ff.

restrictions upon the efficiency of these units (even though by governmental authority) would be not only unfair to the organizations themselves but would assist in the perpetuation of the present uneconomic system whereby an ever-increasing army of middlemen distributes goods to the consumer at an ever-increasing expense.

Another of the uses of the principle of boycotting is in connection with the enforcement of the exclusive arrangements which have been discussed in the preceding section.

The ability to secure exclusive use, purchasing, or selling, etc., depends primarily upon either one or both of two factors:

A. Rebates.

B. The right of refusing to supply goods or of supplying only at discriminatory prices.

While the more common method of the two is perhaps the rebate,[1] yet in the last analysis the enforcement of all such arrangements rests upon the power of boycotting organizations or persons refusing exclusively to use, purchase, sell, etc., certain goods or commodities.

A good illustration of this point is found in the so-called "violation tickler" of the Eastman Kodak Company. This tickler seems to have

[1] For a discussion of this aspect of rebates see the next chapter.

been used for the purpose of recording information in regard to dealers and others violating the Kodak terms of sale together with the action taken in such cases. As previously indicated, these terms of sale contained exclusive arrangements,[1] and some of the reports of the tickler deal with violations of such provisions. For illustrative purposes we shall, for reasons which will appear later, confine our extracts from this document to the action taken in case of the sale or use of "Artura," a photographic paper manufactured by the Artura Photographic Paper Company.

VIOLATION

J. Bourgholtzer, photographer, Washington, Ind. Classed E. K. "B."

7/14/8. Goehn called upon the above party and found him using Artura in his professional work.

8/9/8. Campbell called and confirmed preceding report. He explained our terms of sale and Bourgholtzer claimed he had never known it was a violation of same to use other products. Promised to comply faithfully in the future and use E. K. paper only.

No further action at present. C. F. A.
E.

VIOLATION

W. N. Bullington, photographer, Greenville, Ala. E. K. F. dealer.

[1] Cf. preceding chapter.

11/23/08. W. G. Richardson, paper demonstrator, reported this dealer to be using Artura. Mr. Bullington claimed he did not understand that there were objections to his doing so. The matter was fully explained by the demonstrator, and the dealer said he would make no further purchases, discontinuing the use of Artura as soon as his present stock, a part of a gross, was exhausted.

6/1/09. Wrote Mr. Gazley to ascertain if this dealer was now using our papers exclusively; if not, to place the line with some desirable druggist or other local merchant, advising Mr. Bullington that we would be unable to extend him trade rates in the future.

6/10/09. E. W. Gazley writes as follows: "I found Mr. Bullington using Artura paper. Succeeded in getting into his dark room and found one gross and two parts of gross packages, so did not solicit an order. Think we will have no trouble in placing the line with C. C. Stewart a little later."

Remove name from dealers' list. Wrote Gazley, inquiring if he notified dealer that we would be unable to extend discounts in the future.

Settled.

C. F. A.
N. D.

SECOND VIOLATION

Harry L. Plummer, photographer, Lewiston, Me. Exceptional "E. K. A." dealer.

8/29/8. Simonds reports on Form 105-B using Artura paper.

9/10/8. Wrote Newhall to investigate.

C. F. A.
N. D.

Oct. 8th. Newhall called and reports he saw Mr. Plummer and had a long talk with him. Mr. Plummer admitted he was using some Artura and stated his studio business amounted more to him than the sale of amateur supplies. He is very favorably impressed with Artura and would not consider discontinuing its use. Mr. Newhall explained to him we could not continue allowing him discounts unless he was willing to comply strictly and literally with our terms of sale.

Oct. 14th. Removed from list.

Settled.

C. F. A.

VIOLATION

E. A. Walcott, photographer, Barton, Vt. Classed as an "E. K. F." dealer.

Reported by Simonds as using Artura paper. Wrote Newhall to investigate.

7/22/8. Newhall reports called on above as instructed and found he was still using Artura. Would not listen to any proposition to comply with our terms of sale, as he could not get the results on our paper that he can on Artura. States when an E. K. demonstrator can show him equal quality in E. K. goods he will then use them. Newhall states the town is very small and this party is the only one who would be apt to handle the goods—one or two of the other merchants have had them in the past and been unsuccessful. He also states in all probability should we take him off list that our dealer at Barton

Landing would be able to take care of the Barton trade.

Remove name from list.

Settled. C. F. A.[1]
E.

The uneconomic character of arrangements thus restricting or attempting to restrict the sales of competitors' goods may be well illustrated by considering the facts with reference to Artura paper.

The Artura Photographic Paper Company began operations about 1901. With the change from printing-out to gas-light papers came some relief from the difficulty independent manufacturers had had in securing satisfactory raw-paper stock.[2] Under the gas-light method it became possible to utilize a raw stock of a lower quality than that required for printing-out purposes, as the emulsions in gas-light

[1] Government Exhibit 221, violation tickler of Eastman Kodak Co., record, *United States* v. *Eastman Kodak Company, cit. supra*, Vol. VI, pp. 2713–2714, 2723, 2900, 2959. The *New York Trust Investigation* of 1897 contains a list of a large number of concerns whose consignment contracts with the American Tobacco Company were revoked because they had handled opposition goods. That this has been a not uncommon practice there seems little reason to doubt.

[2] To understand the situation which existed in regard to raw-paper stock in the years immediately following 1898, cf. in chap. viii the Eastman arrangements with the foreign raw-paper manufacturers.

papers were not as readily affected by metallic impurities.

The rapid rise of Artura paper is indicated by the increase in its volume of sales.

1901	$ 2,921.31
1902	8,644.41
1903	14,327.20
1904	24,572.92
1905	46,695.34
1906	98,890.36
1907	228,979.79
1908	353,516.49
1909 (9 months)	329,272.44[1]

In the gas-light papers great difficulty appears to have been experienced in securing the proper correlation between the paper and the emulsion. Eastman quite frankly admitted that his company was unable to secure the results that the Artura people obtained when he stated that "We could not make paper of the type of Artura paper."[2] This, moreover, was in the face of the fact that the General Paper Company had experimented for two years

[1] Early, Yauck, Colfax, and Eastman agreement, October 18, 1909, *re* Artura Photographic Paper Company, Government Exhibit 25, record, *United States* v. *Eastman Kodak Company*, *cit. supra*, Vol. V, p. 2073.

[2] George Eastman, *ibid.*, Vol. III, p. 1344.

endeavoring to develop a paper suitable for use with the Artura type of emulsion. "The General Paper Company's paper," however, "blistered, among other things and would not lie flat in the big pictures."[1]

Can it be regarded as economically justifiable in the face of these facts to permit the marketing of Artura paper to be hampered by the exclusive arrangements of the Kodak Company and by the cutting off of the supplies of dealers when they refused to comply therewith? As Mr. Dailey testified, the dealer soon found that "the paper alone is not enough."[2] It was necessary for him to have other photographic supplies to sell and to make a profit on if he was to continue in business.

It is the accepted theory that a private business has the right to select its own customers. In the past, therefore, if a dealer or other person has not sold, purchased, or used exclusively its goods, an organization has possessed the right of ceasing to supply him. In so far as exclusive arrangements are unfair, however, the cutting off of dealers who refuse to comply with such arrangements, or the

[1] George Eastman, *ibid.*

[2] Cf. preceding chapter.

refusal to sell to them except on disadvantageous terms, ought also to be regarded as unfair.[3]

[3] Australia and New Zealand perhaps have gone farthest in the direction of the limitation of the right to select customers. The latter's laws declare that: "Every person commits an offense who, either as principal or agent, refuses, either absolutely or except upon disadvantageous or relatively disadvantageous conditions, to sell or supply to any other person, or to purchase from any other person, any goods for the reason that the latter person—

"(*a*) Deals or has dealt or will deal, or intends to deal, or has not undertaken or will not undertake not to deal with any person or class of persons, either in relation to any particular goods or generally; or

. . . . . .

"(*c*) Does not act or has not acted or will not act, or does not intend to act, or has not undertaken or will not undertake to act, in obedience to or in conformity with the determinations, directions, suggestions, or requests of any commercial trust with respect to the sale, purchase, or supply of any goods."—Acts for the Repression of Monopolies in Trade or Commerce, New Zealand Stats. 1, Geo. V, 1910, No. 32, Sec. 4; quoted in N. B. Williams, *Laws on Trusts and Monopolies* (ed. 1914), pp. 464–65.

The Australian law is similar.

It is the view of the writer that a refusal to sell on account of a failure to conform to exclusive arrangements would amount to a violation of section 5 of the Trade Commission Act in so far as the exclusive arrangements were themselves unfair. As has been previously pointed out, section 3 of the Clayton Act also declares unlawful certain exclusive arrangements "where the effect . . . . may be to substantially lessen competition or tend to create a monopoly." Refusals to sell, therefore, if based on nonconformance with the exclusive conditions forbidden by this section, may perhaps also be regarded as violating the Clayton Act.

CHAPTER VII

REBATES AND PREFERENTIAL ARRANGEMENTS

Discriminations in the form of rebates and preferential contracts are made by two classes of organizations:

A. Manufacturing and trading companies.
B. Transportation companies.

A. One of the most common methods of maintaining exclusive arrangements is the use of a rebate. The factors' agreements of the American Tobacco Company from which the exclusive selling clause was quoted in chap. v also contained the following provision:

Eighth. If, however, you handle cigarettes of our manufacture exclusively, and do not sell or distribute, or in any way aid in the sale, or distribution of, cigarettes of other manufacture, and if you, in all respects, fully comply with the terms and conditions of this agreement, we will pay you an additional commission of seven and one-half ($7\frac{1}{2}$) per cent. on the amount realized by you from the sale of the cigarettes which we may consign to you.[1]

[1] Report and proceedings of the joint committee of the Senate and Assembly appointed to investigate trusts, state of New York, Senate Document No. 40, 1897, p. 880.

The exclusive sales contract for photographic paper in effect May 1, 1901, contained this clause:

On or about the 20th of each month a memorandum showing amount of previous month's net paper purchases will be sent to each dealer from each factory. If this memorandum is returned at the time indicated thereon, properly signed and verified to the satisfaction of this company, a credit amounting to 12 per cent on the net purchases will be made to the dealer so returning same.

Fifteen per cent represents the full trade discount on paper but *an extra credit*, as stated above, *is offered as a special consideration* for advantages accruing . . . . through having our specialties sold in original packages and at a price that affords the dealer a profit large enough to warrant his energetically and *exclusively* pushing their sale.[1]

Of like nature is a provision drawn from the "jobbers' license agreement" of the recently dissolved Bathtub Trust, which reads:

7. If all the conditions of this agreement have been complied with and *you have confined your purchases to Licensed Manufacturers*, we will pay you rebates on

[1] Italics are the writer's. Quotation is taken from the terms of sale supplied by W. S. Hubbell, counsel for the General Aristo Company, *Report of the United States Industrial Commission on Trusts and Industrial Combinations* (second volume on this subject), Vol. XIII, p. 192. At that time the Eastman Kodak Company was the trade agent to market all the goods of the General Aristo Company.

such purchases as you have made from us . . . . [schedule of discount follows].[1]

An interesting rebate arrangement designed to secure exclusive purchasing and selling was utilized by the Continental Tobacco Company in 1902. This concern assigned to an intending purchaser a certain amount of its goods, which amount he was required to purchase during each subsequent period of four months. The allotment thus made was a great deal in excess of the amount which the purchaser would be able to dispose of during that period; and, moreover, the prices charged therefor were so high that if the customer paid them, the buying and selling would not be profitable. Each purchaser was required to refrain from dealing in plug chewing tobacco made by independent and competing manufacturers, and if he complied with this restriction, his allotment was invariably reduced to the amount he was able to sell. At the same time he was rebated such a percentage of the aggregate price of the goods acquired that the handling of these commodities was, by reason of this rebate, made profitable to him.[2]

[1] Record, *United States* v. *Standard Sanitary Manufacturing Company, cit. supra*, Vol. II, pp. 34–35. Italics are the writer's. Cf. chap. v, *supra*.

[2] *Whitewell* v. *Continental Tobacco Company*, 125 Fed. 454.

The discounts made by the Continental Wall Paper Company to the jobbing trade depended upon conformance with the exclusive-purchasing arrangements cited in a preceding chapter.[1] The same was true of the agreements of the jobbing trade with the Pottery Association.[2] Similarly, so it is alleged, the Cleveland Stone Company secured the exclusive handling of its grindstones, offering a rebate of $12\frac{1}{2}$ per cent on purchases made by jobbers in the period of the preceding six months provided they had purchased exclusively from it.[3]

Differing somewhat from these rebate arrangements was the plan of the Corn Products Refining Company. In November, 1906, just prior to the period when the first independent glucose company placed its products upon the market, this organization was alleged to have offered to the trade a profit-sharing or rebate plan, the purpose of which was to secure exclusive purchasing. The Corn Products Refining Company and its subsidiaries agreed to set aside for payment to their customers, out

[1] *Continental Wall Paper Company* v. *Lewis Voight & Sons Company*, 148 Fed. 939. Cf. chap. v, *supra*.

[2] *Morony Hardware Company* v. *Goodwin Pottery Company*, 120 S.W. 1088. Cf. chap. v, *supra*.

[3] Petition, *United States* v. *Cleveland Stone Company*, *cit. supra*, p. 20. Cf. chap. v, *supra*.

of the profits of the last six months of 1906, a sum equal to ten cents per hundred pounds upon all sales of glucose and grape sugar, the payment to be made on December 31, 1907, on the condition that customers should purchase exclusively from the company during the balance of the year 1906, and *all of the year 1907*. It was charged that this plan was continued until 1910.[1]

If exclusive contracts and arrangements are unfair, it would appear to follow that all rebates offered for the purpose of effecting such arrangements are likewise unfair. As indicated in the preceding chapter, the ability to secure exclusive arrangements usually depends either upon rebates or upon the power to refuse to supply goods, the latter either absolutely or except under disadvantageous conditions. If these two things[2] were eliminated, no person or organization need use, sell, or purchase, etc., exclusively except as a matter of choice and

[1] Petition, *United States* v. *Corn Products Refining Company*, U.S.D.C. for the Southern District of New York, pp. 20–21.

[2] Australia and New Zealand appear to have prohibited both practices in such connection. In the preceding chapter there were quoted the provisions of her laws forbidding the refusal of goods under certain conditions (cf. footnote, p. 112). The same law also declares: "Every person commits an offense who, either as principal or agent, in respect of dealings in any goods, gives, offers, or agrees to give to any other person any rebate, refund,

upon the basis of the quality and prices of the goods offered. And at any time he or it would be perfectly free to introduce or deal in goods of an equally satisfactory or better quality or of an equivalent or lower price.[1]

discount, concession, allowance, reward, or other valuable consideration for the reason or upon the express or implied condition that the latter person—

"(*a*) Deals or has dealt or will deal, or intends or undertakes or has undertaken or will undertake to deal, exclusively or principally, or to such an extent as amounts to exclusive or principal dealing, with any person or class of persons either in relation to any particular goods or generally; or

"(*b*) Does not deal or has not dealt or will not deal, or intends or undertakes or has undertaken or will undertake not to deal, with any person or class of persons, either in relation to any particular goods or generally; or

"(*c*) Restricts or has restricted or will restrict, or intends or undertakes or has undertaken or will undertake to restrict, his dealing with any person or class of persons, either in relation to any particular goods or generally; or

. . . . . .

"(*e*) Acts or has acted or will act, or intends or undertakes or has undertaken or will undertake to act, in obedience to or in conformity with the determinations, directions, suggestions, or requests of any commercial trust with respect to the sale, purchase, or supply of any goods."—Acts for the Repression of Monopolies in Trade or Commerce, New Zealand Stats. 1, Geo. V, 1910, No. 32, Sec. 3; quoted in N. B. Williams, *Laws on Trusts and Monopolies*, p. 464. Australia similarly limits the right to select customers.

[1] The writer is inclined to consider that rebates and preferences used to procure conformance with exclusive arrangements constitute violations of section 5 of the Trade Commission Act in so far as the exclusive conditions are themselves unfair. In addition, section 3 of the Clayton Act declares unlawful rebates and discounts used to maintain exclusive arrangements "where the effect . . . . may be to substantially lessen competition or tend to create a monopoly."

The rebate is probably a more effective instrument for enforcing exclusive arrangements than is the right of refusing goods. This fact perhaps accounts for the preference given it in connection with such arrangements. The rebate plan makes a strong appeal to the cupidity of the purchaser or dealer, and it does not usually appear compulsory in its nature.[1] The bald statement that goods must be used, sold, or purchased exclusively, together with a declaration that goods will be otherwise refused, is not unlikely to arouse antagonism. The hostility thus developed may result in a refusal by certain organizations to enter into an exclusive arrangement in the first instance or, once having done so, to abide by its terms. Furthermore, it should be thoroughly appreciated that the mere fact that rebates are given in no way lessens the power of the manufacturer to refuse goods. It would be a most erroneous interpretation to assume that, because rebate allowances are made, the only penalty for failure to conform to exclusive conditions would be the loss of the rebate. Undoubtedly this allowance would be sacrificed, but there might be withdrawn in addition the privilege of obtaining

[1] In this connection note the wording of the rebate clauses which have been quoted in this chapter.

further supplies of goods or commodities. It is scarcely conceivable that a manufacturer or seller will for any continued length of time merely refuse the rebate and continue to sell organizations declining to comply with the exclusive arrangement. No better proof of this can be cited than a bit of evidence from the Eastman Kodak case. It will be recalled that the conditional credit system of the Kodak Combination gave a 15 per cent discount to the dealer plus an additional 12 per cent upon his certifying that he had complied with the rules, including the requirement of exclusively pushing the sale of Eastman products.[1] Although by the terms of the offer any dealer could apparently buy the goods at the regular trade discount of 15 per cent, if he desired to handle competing goods, the instructions to adjusters which were dated March 29, 1900, read:

> If, for instance, a dealer says to you that he is willing to forfeit the rebate but intends to continue handling our goods, then you should tell him that we could not afford to consent to that. . . . . "If a dealer will not comply with our terms of sale, the probabilities are that it is not to our interests to sell him."[2]

[1] Cf. *supra*, p. 114.

[2] Government Exhibit 31, record, *United States* v. *Eastman Kodak Company, cit. supra*, Vol. V, p. 2095.

Mr. Alexander, a Philadelphia dealer, who had handled Velox papers before the company manufacturing them sold out, was visited by a Mr. Parmalee of the Eastman Kodak Company, who found competing paper on his shelves. Mr. Alexander said that he was willing to continue to do business on the 15 per cent basis but wished to continue to handle competing goods. Mr. Parmalee stated that "anyone handling other products besides theirs would not be allowed to handle them," and he further stated that he could not accept any orders. Thereafter Mr. Alexander's orders were declined.[1]

Two decidedly interesting contracts are those of the Electric Lamp Combination and the American Can Company. The government charged the Electric Lamp Combination with entering into preferential contracts with the Libby Glass Company, the Fostoria Bulb and Bottle Company, the Phoenix Glass Company, and the Corning Glass Works—"substantially the only manufacturers" of glass bulbs and tubing in the United States. On condition that these concerns should sell to independent lamp manufacturers *only* at higher prices than it was itself compelled to pay, the combination

[1] Record, *ibid.*, Vol. II, pp. 812–13.

agreed to purchase from them its entire supply of these materials. A contract of a similar nature was also made with the Providence Gas Burner Company, "the only base manufacturer in the United States."[1]

The minutes of the United States Steel Corporation of April 17, 1902, contain the record of a vote agreeing to a preferential contract upon tin plate to be supplied to the American Can Company. This contract was to and did run for five years. It was followed by a second five-year contract, dated December 1, 1908, and a third contract for six years, dated April 28, 1913. By the terms of the contract of December 1, 1908, the American Can Company agreed to buy 99.9 per cent of its domestic requirements from the American Sheet and Tin Plate Company,[2] the latter in return agreeing to allow the American Can Company a scale of preferentials from their net selling schedule, as follows:

	Preferential
$3.85 or higher per base box	$22\frac{1}{2}$ cents per base box
3.80 per base box	$21\frac{5}{8}$ " " " "
3.75 " " "	$20\frac{5}{8}$ " " " "

[1] Petition, *United States* v. *General Electric Company*, *cit. supra*, pp. 35–36.

[2] A subsidiary of the United States Steel Corporation formed by the consolidation of the American Sheet Steel and American Tin Plate companies.

		Preferential
3.70 per base box.....	$19\frac{5}{8}$	cents per base box
3.65 " " "	$18\frac{3}{4}$	" " " "
3.60 " " "	$18\frac{1}{8}$	" " " "
3.55 " " "	$17\frac{1}{2}$	" " " "
3.50 " " "	$16\frac{7}{8}$	" " " "
3.45 " " "	$16\frac{1}{4}$	" " " "
3.40 " " "	$15\frac{5}{8}$	" " " "
3.35 " " "	15	" " " "
3.30 " " "	$14\frac{3}{8}$	" " " "
3.25 " " "	$13\frac{3}{4}$	" " " "
3.20 " " "	$13\frac{1}{8}$	" " " "
3.15 " " "	$12\frac{1}{2}$	" " " "
3.10 " " "	$11\frac{7}{8}$	" " " "
3.05 " " "	$11\frac{1}{4}$	" " " "
3.00 " " "	$10\frac{5}{8}$	" " " "
2.95 or lower per base box...	10	" " " "

On black plate, black and galvanized sheets
15 cents per 100 lbs.

On galvanized wasters.....$1.00 a net ton[1]

In the exclusive arrangements of manufacturing and trading companies, and in discriminations used to secure their adoption the unfairness which usually results is one toward the competitors of the organization using these conditions. The manufacturer's exclusive arrangements and rebates for compliance therewith tend to close the channels of distribution to the goods of his competitors. In the case

[1] Petitioner's Exhibit No. 22, record, *United States* v. *American Can Company, cit. supra*, Vol. I, pp. 215–17.

of preferential arrangements like those of the American Can Company with the American Sheet and Tin Plate Company, however, a double unfairness may exist. According to the theory submitted in the chapter on exclusive contracts and arrangements, such a contract is unfair to the competitors of the American Sheet and Tin Plate Company in practically prohibiting the American Can Company from purchasing from them. In addition, however, it is most emphatically unfair to the competitors of the American Can Company. The latter point appears more clearly when the following clause of the contract of December 1, 1908, is considered:

> American Sheet and Tin Plate Company agrees that if it should at any time during the term of this contract give or allow a preferential off its net prevailing prices on coke plates for domestic use to any other customer in the United States, that thereupon an additional preferential shall be given of the same amount per box on the same number or [*sic*] boxes to American Can Company.[1]

By no possibility therefore in the face of this provision could competing can manufacturers secure a price which would place them upon

[1] Petitioner's Exhibit No. 22, record, *United States* v. *American Can Company*, *cit. supra*, Vol. I, p. 216.

an equal footing with the Can Company even though they were likewise to agree to purchase all their plate requirements of the Amercan Sheet and Tin Plate Company. In themselves these preferentials as shown above do not appear very large, and it is only by considering the large quantities of plate purchased that one realizes the full significance of this contract both to actual and possible competitors of the Can Company and to the Can Company itself. As shown by Table I, in the period from 1902

TABLE I

RATIO OF TIN-PLATE REBATES TO THE NET PROFITS OF THE AMERICAN CAN COMPANY*

Report for Year Ending	Profits (Net)†	Calendar Year	Rebates	Percentage of Rebate to Net Profits
March 31, 1903...	$ 886,710.76	1902	$ 565,872.68	63.8
March 31, 1904...	2,394,510.11	1903	766,775.45	32.0
March 31, 1905...	2,896,917.51	1904	484,933.06	16.7
December 31, 1905 (9 mos.).....	2,311,417.01	1905	588,923.31	25.4
December 31, 1906	2,113,421.17	1906	774,679.80	36.6
December 31, 1907	2,652,392.32	1907	809,318.73	30.5
December 31, 1908	2,706,263.54	1908	739,872.14	27.3
December 31, 1909	2,756,151.20	1909	827,234.23	30.0
December 31, 1910	2,822,972.48	1910	907,506.26	32.1
December 31, 1911	2,916,339.27	1911	1,053,220.80	36.1
December 31, 1912	6,539,046.26	1912	1,723,730.64	26.3
Total.....	$30,996,141.63		$9,242,067.10	29 6

* This table was compiled from the figures of Accountant Charles Denman. Tin Plate Rebates Analysis, "Secretary" Account General Ledgers (Petitioner's Exhibit 930, record, *United States* v. *American Can Company, cit. supra*, Vol. VIII, pp. 3653 ff.) and the Income Accounts of the American Can Company, 1903–12 (Petitioner's Exhibits 8–19, *ibid.*, Vol. II, pp. 491 ff.). It will be noted that the yearly comparison of rebates and profits is not strictly accurate owing to the fact that the calendar year does not, during the first part of the period, coincide with the fiscal year. The writer has during these years used the rebate figures for the calendar year next preceding the fiscal year ending March 31 for which the income figures are taken.

† After depreciation and occasionally other deductions.

to 1912, the preferentials thus accorded to the American Can Company have amounted to the large sum of $9,242,067.10.

Year by year the amount of the tin plate rebates has never been equivalent to less than 16 per cent of the net profits of the Can Company. In each of six years of this period it has been above 30 per cent and in one year amounted to 63.8 per cent. The total amount of rebates, $9,242,067.10, is equivalent to 29 per cent of the total profits of $30,996,141.63 made by the American Can Company from 1902 to 1912. That such an arrangement is unfair requires no elucidation. It is readily seen how preferences of such a nature might result in the utter destruction of the competitors of an organization.

In the contracts of the Electric Lamp Combination there exists the same double unfairness as that just described. Since practically all the manufacturers of glass bulbs, tubing, and bases were parties to these contracts, such arrangements could scarcely be regarded as unfair to any existing manufacturer of such articles. But possible as well as actual competition must be considered, and according to the theory set forth in the discussion of exclusive arrangements, such exclusive purchasing

contracts as those of the Electric Lamp Combination with the manufacturers of bulbs, tubing, and bases might have had a tendency to prevent new organizations from embarking in the manufacture of such articles. In addition, the contracts were clearly unfair to competitors of the Electric Lamp Combination since the former were thus placed at a disadvantage as compared with the latter in the purchase of materials.

B. Rebates given by transportation companies are sometimes designed to maintain exclusive arrangements in the same way as are rebates given by manufacturing companies. Perhaps the best illustration of this method as used by transportation companies is to be found in the deferred-rebate contracts of the various steamship conferences.[1] The deferred

[1] This term was defined by the "Royal Commission" as follows: "A Shipping 'Ring' or 'Conference' is a combination more or less close of Shipping Companies formed for the purpose of regulating or restricting competition in the carrying trade on a given trade route or routes." Cf. *Report of the Royal Commission on Shipping Rings with Minutes of Evidence and Appendices*, Vol. I, Part II, p. 9. Further quotations from the same report indicate more clearly the nature of the "Conference" or "Ring." "The operations of a Conference are confined to a particular trade route, that is to say, the engagements which the various lines enter into with one another only apply to the trade within certain definite areas or between specific ports. A Steamship Company may be a member of several

rebate is explained in the *Report of the Royal Commission on Shipping Rings* as follows:

The Companies issue a notice or circular to shippers informing them that if at the end of a certain period (usually four or six months) they have not shipped goods by any vessels other than those dispatched by members of the Conference they will be credited with a sum equivalent to a certain part (usually 10 per cent.) of the aggregate freights paid on their shipments during that period, and that this sum will be paid over to them, if at the end of a further period, (usually four or six months), they have continued to confine their shipments to vessels belonging to members of the Conference. The sum so paid is known as a deferred rebate.[1]

As applied to American conditions the deferred rebate has been used at one time or another by "conference" lines sailing to and/or from American ports and South and East Africa, Argentina, Brazil, Central America,

Conferences, but its engagements in one are independent of those in any other. . . . .

"The main objects with which a Conference is formed are two. It is formed primarily to regulate competition between the Companies with a view to maintaining regular rates of freight. This object is achieved by means of an agreement or understanding between the Lines that they will charge the same rates of freight. . . . .

"The second object is to concert measures to meet the competition of ship owners outside the Conference."—*Report of the Royal Commission on Shipping Rings*, etc., *cit. supra*, Vol. I, Part II, p. 9.

[1] *Ibid.*, p. 9.

Jamaica, Porto Rico, Trinidad, and various ports in the Far East.[1]

The chief unfairness of competition under railroad rebates is that it unduly favors certain shippers over the lines of a railroad. One organization is enabled by the preferences afforded it to injure and destroy others perhaps equally efficient but not equally favored. This situation apparently does not result from the deferred-rebate contracts of the steamship conferences, at least so far as American trade is concerned. As a report submitted by the representatives of certain steamship lines to the Committee on the Investigation of Shipping Combinations phrased it:

> The system of deferred rebates to loyal shippers has none of the evils of the secret rebate which was formerly employed by railroads. *Rebates* which exist

[1] *Proceedings of the Committee on Merchant Marine and Fisheries in the Investigation of Shipping Combinations*, pp. 118–19, 148, 171–72, 174, 279, 282, 310, 323–25, 418, 429, 527, 879–80, 906, 1209, 1222–23. In most cases the deferred rebates in these trades are made on a percentage basis, 10 per cent being the most prevalent rate. In some instances, however, the deferred rebates are specific, a definite amount being paid per ton of goods shipped. Sometimes the rebate applies only to certain commodities. In other cases it applies to all the goods shipped. The rebate period is usually six months and the period of deferment is usually six months also. W. H. S. Stevens, "The Administration and Enforcement of Steamship Agreements and Conferences," *The Annals*, LV [September, 1914], 142–43.

in certain trades from distant countries to the United States are *open* and *public*. . . . . *Any merchant may obtain the benefit of this published allowance* by complying with the terms of the circulars.[1]

If these statements are true,[2] and so long as they continue to be true, the deferred-rebate contracts of the steamship conferences do not work an unfairness which enables one shipper to injure and destroy a competitor.[3] This being the case, it is necessary to seek elsewhere to discover the reason for regarding deferred-rebate contracts as unfair. Suppose a steamer sails with a cargo from port A to port B expecting to secure at B shipments of commodities to fill its hold on the return voyage. Assume also that a conference agreement with deferred-rebate contracts is in force in the trade from B to A. Obviously the steamer in question will have small chance of obtaining the antici-

[1] Report submitted to the Committee on Merchant Marine and Fisheries in investigation of shipping combinations, by the committee appointed by the representatives of the steamship lines maintaining established services from New York to foreign countries, including Porto Rico and the Philippines, *cit. supra*, p. 1369. Italics are the writer's.

[2] The evidence seems on the whole to indicate that they are.

[3] It might be asked if a shipper who repeatedly broke his contract by shipping over other than conference lines would always be allowed on his application to ship under the terms of the deferred-rebate contract. If not, he would obviously be discriminated against as compared with other companies.

pated cargo. If a merchant ships by a steamer which is not a member of the conference, he loses his rebates, not only for the rebate period in which he makes the shipment, but also those for the prior rebate period, payment of which has been deferred. No matter how great a reduction in rates is offered by our hypothetical steamer, it, as a rule, will still be insufficient to secure cargo. The reason is evident. The amount which the shipper would gain by thus violating his contract would seldom, if ever, even approach the total sum of the rebates which he receives by complying therewith.

Under conditions of true economic competition it is clear that the lowest bidder would secure the freight. The deferred rebate prevents this result. Consequently it must be regarded as unfair competition. Its inevitable tendency as well as its acknowledged purpose and intent is to destroy all competition in the carrying trade and place it in the hands of the parties to the conference agreement.[1]

[1] While believing that deferred-rebate contracts must be regarded as unfair competition, the writer is far from contending that competition in the transoceanic steamship trade is either necessary or desirable. A large part of this traffic may be not unfairly described as monopolistic in character. A considerable number of commodities require a certain regularity and rapidity in transportation service. The amount of this type of freight is frequently not large enough to afford a profit to more than

Somewhat similar to the deferred-rebate contracts of the various steamship conferences were the rebate arrangements formerly employed upon the Great Lakes. As early as the year 1900 the Great Lakes Towing Company inaugurated a system of exclusive arrangements whereby large discounts from the regular tariff rates were granted by the Towing Company on the condition that the vessel owners would employ through the entire season the company's tug and wrecking service at all ports covered by its tariffs in so far as the vessel

a relatively small number of vessels. If unlimited competition is permitted, the tendency would probably be for the necessary regularity and rapidity to disappear. Lines which had maintained these conditions would be compelled to withdraw, since it would no longer be profitable to have regular sailing dates nor to devote to this service steamers sufficiently large and powerful to supply rapid transportation.

Important as these considerations are, they cannot alter the conclusion that under present conditions deferred-rebate contracts constitute unfair competition. Yet they are significant, since they show that there are fields in which the principle of free competition is in all probability economically unsound. Possibly, indeed probably, there are other lines of business besides that of the transoceanic steamship traffic to which this statement would apply with equal force. It certainly seems desirable that some form of regulation should be adopted which will recognize the necessities of ocean steamship traffic. A line maintaining a regular and rapid service between certain ports would appear entitled to charge a somewhat higher rate for it. Nor does it seem just that its traffic should be at the mercy of any chance tramp steamer that may drop into port to secure a cargo. Yet the difficulty of adequate regulation is great. The

owners had occasion for such service. In 1910 owners were allowed a flat discount of 20 per cent. At no time was the discount less than 20 per cent, and in succeeding years it varied with the class of service. No discounts were given except under exclusive contracts, and the vessel owner was, in addition, guaranteed that his contract rates taken together should not exceed the sum of the cut rates made to meet competition.[1]

It is now quite generally the view that railroad rebating is an unfair practice. The

trade is between different countries. Many objections, therefore, exist to a form of regulation similar to that afforded by the Interstate Commerce Commission. The ideal solution would probably be a commission composed of representatives of the great carrying nations. This body would designate the conference areas, determine the conditions under which steamship lines could become members, and prescribe the circumstances under which "tramps" and similar vessels might compete with the conference lines for cargo. The system in vogue at present is designed to and does shut out competition within the conference area. However desirable rapid and regular service may be from the standpoint of the shipper, however necessary to maintain these conditions deferred-rebate contracts may be, they are at present unfair to competing steamers and lines. Under no circumstances except, perhaps, the strictest government regulation and supervision should they be permitted. Since this was written an act of Congress has created a Shipping Board. This measure has declared unlawful deferred rebates, the use of fighting ships, and various kinds of discriminations. An Act to establish a United States Shipping Board, etc. Approved Sept. 7, 1916.

[1] 208 Fed. 738–39.

basis of this opinion is to be found in the fact that through such rebates certain shippers are benefited and placed at an advantage as compared with other shippers over the same railroad who should logically be entitled to receive the same rates for equal shipments of like commodities. This fact is so generally recognized that the subject of railroad discriminations requires little examination or discussion.[1] A single illustration of such methods will therefore suffice—the transportation of oil. In its study of this subject the Bureau of Corporations based its investigation principally upon the tariffs and records of the railroads themselves. The Report of the Bureau stated that the "general result of the investigation has been to disclose the existence of

[1] The question may perhaps be raised as to why the writer includes railway rebates in a discussion of unfair competition, since the persons who are injured by the said rebates are not in competition with the railroad company. In the writer's estimation the answer to this question is that under this situation the action of the railroad in giving the rebate becomes an integral part of the competition of the organization to which the said rebate is given, and as such the entire transaction should be regarded as an act of unfair competition toward other shippers who are not benefited thereby. This theory may appear to the reader to be rather far-fetched. At the same time the writer considers that the situation is such that to all intents and purposes the act of the railroad company in this connection is a competitive act, although the railroad, of course, is not in competition with the shippers.

numerous and flagrant discriminations by the railroads." The Bureau further found that discriminations in the transportation of oil embraced a variety of forms, the "more important of which," so the Summary states, "may be classed under the following heads:

"1. Secret and semisecret rates.
"2. Discriminations in the open arrangement of rates.
"3. Discriminations in the classification and rules of shipment.
"4. Discriminations in treatment of private tank cars."[1]

It is noteworthy that a number of secret rates and open discriminations disclosed by the investigation of the Bureau of Corporations were abolished by the railroads shortly after their discovery.[2]

Industrial "tap lines" also furnish opportunities for disguised rebates. The Corn Products Refining Company owns switching railroads which connect its four principal plants at Pekin, Granite City, Argo, and Davenport with the trunk lines. Through rates were made by the switching and trunk lines in conjunction with one another. The government

[1] *Report of the Commissioner of Corporations on the Transportation of Petroleum*, p. 1.

[2] *Ibid.*, Letter of Submittal, p. xxv.

asserts that prior to March, 1910, the share of these rates which was given to the switching lines was excessive as compared with the service actually performed. This practice was equivalent to a rebate from the railroad company for a part of the freight rates. The practice was finally forbidden by the rulings of the Interstate Commerce Commission.[1]

The situation just outlined does not differ materially from those cases where "tap-line" services—the handling of products from the place of production to the main line of the railroad—are furnished free of charge. In an opinion on this latter point the Interstate Commerce Commission expresses the following view:

> What we decide . . . . is that these practices are unlawful in themselves because they are rebates, in fact and in effect, and also give undue and unreasonable preferences and advantages to the industries so favored and work undue and unreasonable prejudice and disadvantage to shippers in the same business who do not receive any such allowances or rebates and who do not receive the benefit of any such services.

In 1900 the owners of all rail elevators in Buffalo, with the exception of the Kellogg elevator, formed a joint-stock association

[1] Petition, *United States* v. *Corn Products Refining Company*, *cit. supra*, p. 28.

[2] *New York Times*, January 28, 1914.

known as the Western Elevator Association. This association entered into contracts with the railroad companies whereby the latter agreed to pay the former one-half cent per bushel for all grain transported by them regardless of whether such grain was handled by the elevators of the association or by the Kellogg elevator. To carry out this arrangement the railroads added one-half cent per bushel as elevator charges to all grain carried by them and delivered the amount accruing to the association. In case the owners of the Kellogg elevator insisted upon receiving one-half cent per bushel for elevating grain, that grain was made to pay an elevator charge of one cent a bushel. The result of this situation was, of course, to deter shippers of grain from utilizing the Kellogg elevators.[1]

It requires but little demonstration to show that preferential arrangements and rebates used by transportation companies for other purposes than to secure exclusive arrangements are unfair. A transportation rate given to one concern lower than to other and competing concerns enables the former to diminish its prices by the difference between the two

[1] *Kellogg* v. *Sowerby*, 93 N.Y. App. Div. Sup. Ct. 124. Kellogg & Company sued and obtained damages.

charges, in the same way as when materials which enter into the productive process are sold to one organization at lower prices than to its competitors. In both cases that productive efficiency which may have enabled marginal concerns to compete is rendered ineffectual; and such organizations, if any there be, will be compelled to discontinue business. It is also true that not even the most highly efficient competing organizations will be able to maintain themselves if the differential between either the two prices for transportation or the two prices for materials becomes sufficiently great. At the same time the beneficiary of rebates and preferential contracts may be notoriously inefficient—so inefficient that it could not exist for a moment under economically fair competition. Yet in the face of the unfair conditions described little or no competition whatsoever may be able to survive.

CHAPTER VIII

ENGROSSING MACHINERY OR GOODS USED IN THE MANUFACTURING PROCESS

In the United States, attempts to acquire control of the machinery necessary to the manufacture of goods apparently date from nearly three decades ago. On or about April 30, 1887, the Standard Envelope Company[1] made a contract with Lester & Wasley, of Norwich, Connecticut, to purchase all the envelope machines which that firm might make or sell during the five succeeding years. At the same time Lester & Wasley on their part agreed not to furnish more than twenty-four machines in any one year.[2] Whether or not this firm was the sole manufacturer of envelope machinery does not appear.

[1] The Standard Envelope Company was a corporation of Massachusetts organized by, and used as a clearing-house for, a combination of several of the largest envelope manufacturers of the United States. For a brief account of the organization and operation of this combination, cf. an article by the writer in the *American Economic Review*, III (September, 1913), p. 561.

[2] Report of the Committee on General Laws, on the investigation relative to trusts, New York Senate Document No. 50, 1888, p. 469.

The thirteenth annual report of the Commissioner of Labor indicated the very remarkable advantages obtained by manufacturing cigarettes by machinery instead of by hand. The labor cost of a certain cigarette made by hand in 1876 was 96.5 cents per thousand, while the same cigarette made by machinery in 1895 cost only 8.1 cents per thousand for labor. Similar savings in labor cost were effected on other classes of cigarettes. Although the Hook cigarette machine was invented in 1872, it was not until about ten years later that the use of cigarette machines became practically successful. By 1884, however, the daily output of a single Bonsack machine was 120,000 cigarettes, or about fifty times as many as a rapid cigarette-roller could produce by hand.

In 1890, when fully 90 per cent of the total cigarette production of the United States was in the hands of five concerns,[1] the best machines in use were the Bonsack and the Allison. As only a limited number of organizations besides these five were using those machines, there is some ground for the view that the possibility

[1] W. Duke Sons & Company, Allen & Ginter, Goodwin & Company, Kinney Tobacco Company, and William S. Kimball & Company.

of securing an exclusive control over cigarette machinery was one of the reasons leading to the organization of the American Tobacco Company.[1] This combination acquired, with the Kinney and Kimball branches both parties to its organization, the Allison cigarette machines which these branches had been using. One of the members of the Kinney Company had owned the patents for this machine, and the Allison Machine Company had been incorporated in New Jersey in 1889 by the same men who afterward organized the American Tobacco Company. Charles G. Emery, the first treasurer of the American, was also the inventor of the Emery cigarette machine which Goodwin & Company had used. At its inception, therefore, the American acquired control of these two machines. Soon after, it also made a contract with the Bonsack Machine Company for the privilege of the exclusive use and control in the United States of the Bonsack machine. The American had the right to cancel the contract if the Bonsack Company failed to secure for it the exclusive use of this type of machine prior to March 1, 1891. It might also exercise the same right whenever as many as one

[1] *Report of the Commissioner of Corporations on the Tobacco Industry*, Part I, pp. 63–64.

hundred million cigarettes were manufactured in this country within a period of twelve consecutive months by factories or concerns outside the combination, or on machines not controlled by the Bonsack Company. In conformity with this agreement the Bonsack Machine Company terminated its contracts in force with outside manufacturers, and the American continued the use of the machine under this contract until the year 1895.[1]

Still another early example of this method of competition may be given. At the time of the organization of the Continental Wall Paper Company in the later nineties John Waldron & Son and the Kaukauna Machine Company were the only manufacturers in the United States producing wall-paper manufacturing machines. Each concern had one factory where it carried on its business, the former at New Brunswick, New Jersey, the latter at Kaukauna, Wisconsin. These two machinery manufacturers entered into contracts with the Continental Wall Paper Company whereby

[1] Adverse judicial decision lost the Bonsack Company the exclusive right to use the most important parts of its machine. On January 2, 1896, therefore, the American ceased to pay royalties and to have the exclusive right to the use of the Bonsack machine (*Report of the Commissioner of Corporations on the Tobacco Industry*, Part I, pp. 66–67).

they agreed that they would sell wall-paper manufacturing machines to the Continental Company only.[1]

More recent instances of the use of the method under discussion are numerous. According to the government, the only companies in the United States which formerly manufactured suitable and efficient electric-lamp-making machinery were the York Electric and Machine Company and Elmer F. Dwyer, the latter trading as the Dwyer Machine Company. By the terms of certain agreements the Electric Lamp Combination, through the National Electric Lamp Company, acquired all the patents, applications, and machinery on hand which these organizations possessed. In addition, the York and Dwyer companies agreed to refrain from producing lamp-making machinery, except for sale to the members of the combination.[2]

The American Can Company, at or about the time of its formation, acquired control of the businesses or the output of several concerns engaged in the manufacture of automatic body-makers, these being the most important

[1] *Continental Wall Paper Company* v. *Lewis Voight & Sons Company*, 148 Fed. 939, cf. p. 952.

[2] Petition, *United States* v. *General Electric Company, cit. supra*, pp. 34–35.

machines in the manufacture of packers' cans. It also acquired at the same time control of most of the leading concerns engaged in manufacturing automatic side-seamers, headers, floaters, and end-seamers, all of these likewise being important machines. Among the leading can machinery plants and businesses acquired by the American Can Company by the purchase of their assets were Crosby & Company, Norton Brothers, and the Sprague Canning Machinery Company of Chicago, the Robbins Press Works of San Francisco, and the Sleeper Machine Company. By contract it also acquired control of the output of the E. W. Bliss Company of Brooklyn, the Adriance Machine Company, and the Ferracute Machine Company. In addition, it secured a considerable proportion of all of the commercially valuable patents for the manufacture of ordinary can machinery.

By the terms of the contract with the E. W. Bliss Company the American Can Company agreed to pay $100,000 a year to the Bliss Company for a period of six years. The Bliss Company agreed "that during and throughout the aforesaid term and period hereof it will not devise, construct, manufacture or deliver any automatic can-making tools

or machinery except for and to the first party, except for export elsewhere than to Canada."[1]

During the six years while this contract was in force only $117,954.76 worth of machinery was delivered to the American Can Company, so that from a practical standpoint it appears that the American Can Company paid close to half a million dollars in order to prevent the Bliss Company from supplying independents with automatic machinery. Similarly, the six-year contract with the Ferracute Machine Company, running from 1901 to 1907, provided that the American Can Company should pay to that organization $10,000 a year, although the Can Company's purchases did not exceed $5,000[2] during this entire period.

The almost complete control over automatic can-making machinery which was acquired by the American Can Company at the time of its formation was not of extended duration. Within a comparatively few years a number of concerns equipped themselves to manufacture machinery of this character. The

[1] Petitioner's Exhibit 923, record, *United States* v. *American Can Company*, *cit. supra*, Vol. VII, p. 3532.

[2] *Ibid.*, record, Vol. VII, pp. 3350–51, and VIII, p. 3629.

Max Ams Machine Company, for example, became the owner of patents for machinery for making and sealing open-top or sanitary cans, as they are sometimes called. Originally the open-top can had been of small importance when compared with the hole-top can, but the competition of the former type of can soon became substantial, and as a result the American acquired the Sanitary Can Company, the largest concern making and marketing such cans. In addition, the American and Sanitary companies then entered into a contract with the Max Ams Company, the principal manufacturer of open-top can machinery, whereby the latter organization granted an exclusive license to the American and Sanitary companies to use any can-making machinery manufactured under any patent owned by it or thereafter issued to it. The Max Ams Company also bound itself for a period of five years not to sell any such machinery to any person in the United States, Canada, or Hawaii except one concern in Maine and certain of its old customers—packers who required cans for their own use. Upon their part the American and Sanitary companies agreed to purchase annually from the Max Ams Company a certain specified amount of its patented machines

for making solderless or the so-called "sanitary" cans.[1]

Another alleged instance of this type of unfair competition came to light in January, 1914, in a suit brought by the Graham Wood Company of Brooklyn against the Standard Wood Company and the Greene Manufacturing Company. The last-named organization manufactures machines known as "presses," which are useful and to a considerable extent necessary in the production of bundled kindling wood. It appears that the Standard Wood Company entered into a contract with the Greene Company whereby it agreed to pay the latter $5,000 annually, in return for which consideration the Greene Company constituted the Standard Company its exclusive sales agent, and further agreed that it would not sell any press without the consent of the latter. The Graham Company, unable to secure presses to conduct its business, brought a suit for damages against both the Greene and the Standard companies on account of the injury suffered by its business because of the refusal of these two organizations to supply it with machinery.[2]

[1] Petitioner's Exhibit 26, record, *United States* v. *American Can Company, cit. supra*, Vol. I, pp. 230 ff.

[2] Original petition, *United States* v. *Standard Wood Company*, U.S.C.C. for the Southern District of New York, p. 14; *Graham*

Somewhat different from the cases just described are those in which articles or materials entering into the manufacturing process are engrossed instead of the machinery of manufacture.

In the early days of the positive process in photography the method used was to print on a paper in which albumin carried the sensitive salts, and it was customary for each photographer to albuminize and sensitize his own paper. Tests and experiments with the albuminizing process for some three or four decades prior to 1899 had shown that two European concerns made the raw paper which was the most satisfactory, and this paper had become the standard throughout the world for photographic purposes. The necessary requirement of such a paper was that it should be absolutely free from metallic substances, because metal, such as iron, has a tendency to reduce the silver and thus to cause the same chemical change as would be effected by the action of light plus the developer. As a result one would get a spot for every place where the silver salt had been reduced to silver.

Wood Company v. *Standard Wood Company and the Greene Manufacturing Company*, Supreme Court, New York, typewritten copy of motion for judgment, pp. 1–2. This is a further illustration of the results of the unlimited right of selecting customers.

Two places in Europe had water free from metallic substances—Rives, France, and Malmedy, Prussia—and it was Blanchet Frères & Kleber of the former place, and Steinbach & Company of the latter, who produced the standard paper for many years. In fact, it was practically axiomatic that no papers suitable for photographic purposes could be made elsewhere, and all the world used their products.[1]

In the spring of 1898 Blanchet Frères & Kleber and Steinbach & Company combined to form the General Paper Company of Brussels, and immediately raised the price of raw paper. Negotiations were shortly opened with the combination by George Eastman, and, as a result, a contract was entered into between the General Paper Company and the Eastman interests, making the latter sole agents for the papers of the former for use in the gelatine printing-out process in the United States, Canada, and Mexico.[2]

[1] Brief for the United States, *United States* v. *Eastman Kodak Company*, *cit. supra*, pp. 38–39.

[2] "The General Paper Co. gives to the said Kodak Co. the exclusive right to purchase and the exclusive sales agency for the United States of America, Canada, and Mexico of the papers described. . . . .

"It will not sell any of the said plain or baryta coated papers to anyone else in said territory, and will not sell any paper

Dailey, an independent manufacturer, testified before the Industrial Commission as follows regarding the results of this arrangement:

Some of the American manufacturers had contracts with the manufacturers in Germany, so they were protected for a certain length of time; and these which were thus protected the General Aristo Company purchased as far as possible. . . . . But I had no contract at that time, and consequently I was shut off from a supply of raw paper almost completely, although I was able to get some of certain kinds.[1]

In view of this contract it is easily understandable that the Eastman interests sold approximately 98 per cent of the photographic paper in the United States during the year 1901, and that as late as 1904, after independent

elsewhere to be baryta coated to go into such territory to be used for the above purpose. [With one exception.] . . . .

"It will use every practicable means of preventing any of its plain or coated papers being imported into said territory to be used for said purposes by, among other things, compelling its customers to sign an agreement that they will not sell the paper unsensitized to anybody in said territory; and the General Paper Co. further agrees that it will not supply its papers to customers who do not keep this agreement."—Government Exhibit 141, General Paper Co., Steinbach & Co., Blanchet Frères & Kleber, and Eastman Kodak Company, terms of sale, October 20, 1898, *re* raw paper, record, *United States* v. *Eastman Kodak Company*, *cit. supra*, Vol. V, pp. 2047–48.

[1] W. B. Dailey, *Report of the Industrial Commission*, etc., *cit supra*, Vol. XIII, p. 183.

foreign raw paper was attaining some measure of success, Eastman stated that they were doing "at least 75 per cent of the photographic paper trade and hardly as large as 90 per cent."[1]

The government has charged the Aluminum Company of America with endeavoring to obtain such a control of the bauxite properties of the United States as would prevent anyone but itself from producing metal aluminum.[2] Prior to 1905 this company possessed valuable bauxite properties, yet it did not control even 50 per cent of the total bauxite supply of the United States. In that year, however, it acquired the capital stock of the General Bauxite Company through the General Chemical Company. As part consideration for this purchase the General Chemical Company agreed that it would not use bauxite sold to it by the General Bauxite Company for *conversion into metal aluminum*,[3] *nor sell it to any organization which used it for such a purpose, and further, that upon proof of any such use it would*

[1] Brief for the United States, *United States* v. *Eastman Kodak Company*, *cit. supra*, p. 61.

[2] Metal aluminum is manufactured from bauxite.

[3] Sections Fourth and Eighth of the contract between the General Chemical Company and the General Bauxite Company, quoted in petition in equity, *United States* v. *Aluminum Company of America*, U.S.D.C. for the Western District of Pennsylvania, p. 17.

not make any further sales or deliveries to the purchaser thereof.

In 1909 a contract was made with the Norton Chemical Company for the purchase (with one reservation) of the bauxite properties of the Republic Mining and Manufacturing Company, whose capital stock was owned by the Norton Company. Although the Norton Company might mine and use bauxite from a certain forty-acre tract of bauxite land, and might also sell it, it could do so *only in case the use was for some other purpose than for the manufacture of aluminum.*[1]

The writer submits that arrangements of the character cited are instances of unfair competition.[2] They are clearly contrary to the principle of a competition of efficiency. In

[1] Sections Tenth and Eighteenth of Norton Chemical Company contract, quoted in *United States* v. *Aluminum Company of America*, *cit. supra*, p. 19. In considering these contracts made by the Aluminum Company of America, it should be borne in mind that this organization is alleged to control nearly one-half the stock of the Aluminum Castings Company, 37 per cent of the stock of the Aluminum Goods Manufacturing Company, and to be sole owner of the stock of the Northern Aluminum Company and the United States Aluminum Company, manufacturers of aluminum cooking utensils (*ibid.*, pp. 12–14, 29).

[2] This should not be interpreted by the reader to mean that the writer considers that all restrictive covenants are unfair competition. Such a generalization would be altogether too broad and unjustifiable.

every instance they seriously hamper the operation of efficient competing organizations, and, in extreme cases, they may even force the actual discontinuance of such operations. Moreover, the difficulty or impossibility of procuring the necessary tools or implements and supplies is most discouraging to prospective competitors. Thus the probability of potential competitors becoming actual competitors is either greatly lessened or practically eliminated. The economic efficiency of an organization may be very great, but without free access to the necessary machinery and materials it either cannot compete at all or else must do so at an enormous disadvantage. Elsewhere[1] the possible necessity of requiring private businesses to sell upon like terms to all who tender the price has been referred to. If competition is to be maintained, it would appear perhaps to follow that an organization which obtains either an exclusive or a dominant control of the machinery and / or materials used in the manufacturing process must be compelled to sell to competitors upon terms substantially similar to those which it may itself enjoy through such arrangements as it may have effected.

[1] Chap. vi.

CHAPTER IX

ESPIONAGE

It is a well-known fact that some organizations have utilized extremely questionable methods in order to obtain information in regard to the business and operations of their competitors. A report of the Commissioner of Corporations on one industry, which appeared in 1907, contained statements to the effect that railway employees were bribed to supply information in regard to shipments of competitors. A great mass of testimony upon this point has also appeared in one of the dissolution suits brought by the government. A few illustrative examples of these practices may be pertinent.

At one place, according to the testimony, advices were received from railway clerks regarding shipments by independents in that territory, including both the shipments coming in and those going out. This data was sent by the clerks to a post-office box without any name, which was rented for that purpose alone. The information thus obtained was supplied to the salesmen and agents of the company

in question with instructions to secure the business, and usually that organization was able to get a man to the customer before the arrival of the shipment. At another place a freight handler was paid $2.00 a month to furnish information regarding the shipments of an independent. At still another point a foreman or warehouseman of the Pennsylvania Railroad supplied one of the companies with a list of competitive products passing through that warehouse. An employee of this company testified that he secured reports regarding competitive shipments from the employees of the Burlington, Northwestern, Milwaukee, and Union Pacific railroads which covered all independent shipments passing through his district. These reports showed the name of the shipper, name and address of the consignee, and the size of the shipment. The employees supplying this information received compensation for their services.[1]

[1] Section 15 of the act creating the Interstate Commerce Commission, as amended, provides that: "It shall be unlawful for any common carrier subject to the provisions of this Act, or any officer, agent, or employee of such common carrier, or for any other person or corporation lawfully authorized by such common carrier to receive information therefrom, knowingly to disclose to or permit to be acquired by any person or corporation other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the

Besides obtaining information in regard to competitors' shipments from railway employees, there is testimony that in this industry spies and detective agencies were employed for the same purpose.

The testimony is to the effect that the National Cash Register Company employed secret agents who were not known to have any connection with it. Such agents were utilized for various purposes,[1] and at times obtained information regarding competitive business. During the time when the Foss Novelty Company was operating, one Ellingwood was employed by the National to supply inside information as to where that organization placed machines, the amount of business which it did, etc. At that time Ellingwood was

nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier for interstate transportation, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor; and it shall also be unlawful for any person or corporation to solicit or knowingly receive any such information which may be so used." An almost identical provision with reference to water carriers is found in section 20 of the act establishing the United States Shipping Board, approved September 7, 1916.

[1] Carl G. Heyne, record, *State* v. *National Cash Register Company*, *cit. supra*, Vol. II, p. 909. Edgar E. Park, whose operations were detailed in chap. ii, appears to have been one of these agents.

acting as bookkeeper and salesman for the Foss Company. For his services he was paid a salary of $25.00 a week by the National.[1]

J. E. Warren testified that, according to hearsay and what one Gillies himself told him, Gillies was discharged by the Lamson Cash Register Company on the ground that he was a secret agent or spy for the National.[2] Otto Nelson was employed by the National Cash Register Company as a utility man to secure information in regard to opposition companies and the business which they were doing. During the fight against the Osborn Cash Register Company Nelson was sent to Detroit to do what he could to enlighten the National in regard to the competition of the former organization and to watch the shipments it was making.[3]

At another time Nelson was employed in the fight against the Lamson Cash Register Company.

Q. . . . . where was Otto Nelson?

A. He was in Boston.

[1] J. E. Warren, record, *State* v. *National Cash Register Company, cit. supra*, Vol. I, p. 454; Carl G. Heyne, *ibid.*, Vol. II, p. 915.

[2] J. E. Warren, *ibid.*, Vol. I, p. 508.

[3] Henry F. James, *ibid.*, Vol. I, pp. 126–29.

Q. What was he doing at Boston?

A. He was gathering what information he could from competition standpoint and reporting shipments.

Q. Reporting shipments to whom?

A. To dealers or agents.

Q. Reporting shipments of what?

A. The Lamson cash register.

Q. To whom did he report those shipments?

A. To the factory.

Q. To the National Cash Register Company?

A. Yes.

Q. And do you know how he would learn of those shipments?

A. No, I do not.

Q. Where was he located?

A. I only know from what he said; he told me that he rented a room across the street and used a spyglass to read the addresses.

Q. That is, used a spyglass to read the addresses of what?

A. On boxes.

Q. What boxes, of the Lamson machine?

A. Yes.[1]

Around 1899 or 1900 Ben Knecht was employed in the vicinity of Columbus, Ohio, in reporting the shipments of the Hallwood Cash Register Company. This information he secured by calling at the depots and express offices and by watching the wagons as they

[1] J. E. Warren, record, *State National* v. *Cash Register Company*, *cit. supra*, Vol. I. pp. 414–15.

came from the factory.[1] Heyne also testified in June, 1911, that about two years previously he became convinced that the shipments of his organization, the American Cash Register Company, were known to competing agents soon after the goods left the factory. He therefore engaged detectives to watch his wagons, and they reported that every day in a certain week a man by the name of Knecht was waiting at a certain saloon which the delivery wagons of the American were compelled to pass on their way to the freight depot. When the driver would make a delivery in Columbus, Knecht would make entries in a book, apparently copying the addresses upon such shipping boxes as might be seen when the wagon was closely approached. When the driver went to the freight depot, the detectives reported that Knecht would get on an express wagon, apparently kept in waiting for him, and in this manner gain access to the depot. Inside, after the American's driver had entered the freight office, Knecht would again take out his notebook, approach the shipping boxes, and make notes, evidently copying the addresses. The head detective went to the National's office at Columbus and reported to Heyne that

[1] J. E. Warren, *ibid.*, p. 426.

he had asked there for this man Knecht, had met him, and had identified him by having him answer to his name in the sales offices.[1]

Pinkerton detectives were employed by the National Cash Register Company during the Hallwood fight to secure information in regard to the latter organization and its business. From about November or December, 1904, to March or April, 1905, these agents were again employed. Heyne was introduced to the superintendent of the agency and instructed by the acting general manager of the National to have him supply two operatives to spy upon the affairs of the International Cash Register Company of Columbus.[2] Warren further testified that during the Hallwood fight Pinkerton detectives were sent to the agents' school which the National maintained, the purpose being to teach them to go out and call on users and prospective purchasers and also to make such reports as would be valuable to the National.[3] The reports of the various detectives were kept in the vault of the National Cash Register

[1] Carl G. Heyne, record, *State* v. *National Cash Register Company, cit. supra*, Vol. II, p. 1018–19.

[2] Carl G. Heyne, *ibid.*, Vol. II, pp. 988–89.

[3] J. E. Warren, *ibid.*, Vol. I, p. 560.

Company in a special compartment in charge of Counselman's secretary.[1]

In the case of the lumber trade, the government has alleged that Willard G. Hollis, as secretary of the Northwestern Lumbermen's Association, employed for a number of years, with the consent of the officers of that organization, a detective bureau under the management of one Luke W. Boyce. The function of this bureau was to obtain information concerning so-called unethical shipments from manufacturers and wholesalers to consumers.[2]

The United Shoe Machinery Company seems also to have attempted to obtain information in a questionable fashion. Frank Morrison, an employee in the shoe factory of George E. Keith, and employed in the plant of Thomas G. Plant, in the year 1910, testified that he was sent to Mr. Willson of the United Shoe Machinery Company by a man by the name of Johnson. The following is an extract from his testimony regarding his conversation with Willson:

36. *Int.* What did Mr. Willson say to you? Did he say anything to you about a particular machine?

Ans. Well, he was more after about the toe-operating machine and welting.

[1] Lee Counselman, *ibid.*, Vol. I, pp. 642–43.

[2] Petition, *United States* v. *Hollis*, *cit. supra*, p. 40. Cf. chap. vi.

37. *Int.* Now, what information did he attempt to get about that machine?

Ans. Well, one day he told me if I can get a picture taken of a certain machine. I told him I couldn't do that. Well, that was all. I didn't do no work for that. For somebody else I done that work.

38. *Int.* What did you do about demonstrating that machine, or distinguishing the difference between that machine and the United's machine?

Ans. We got a man to come down—

39. *Int.* Who did you get?

Ans. The old man that used to work there on the machine.

40. *Int.* In Mr. Plant's factory?

Ans. Yes, sir.

41. *Int.* What was his name, if you remember?

Ans. His name was J. Tobin.

42. *Int.* What is it, Tobin?

Ans. J. Tobin; Jack, I guess it was. We got him to come down to Lynn and explain there. I didn't go with them. They took him down to some factory in Lynn.[1]

Abram Sochat also testified to the same effect:

15. *Int.* At that conference did Mr. Willson say anything about getting information—about you gentlemen getting information for him in regard to the number of shoes put out, and the quality?

Ans. Yes, sir.

[1] Frank Morrison, brief for the United States, *United States* v. *United Shoe Machinery Company, cit. supra*, pp. 356–57, quoting record, Vol. IV, p. 1706.

16. *Int.* And who was going in to see the machines?

Ans. Yes, sir.

17. *Int.* Did you have any conversation with Mr. Willson at that time about any particular machine used in the Plant factory?

Ans. Yes, sir.

18. *Int.* What was it?

Ans. The toe-lasting machine.

19. *Int.* What did Mr. Willson say about that toe-lasting machine?

Ans. I tried to explain to him and he couldn't very well understand me, and he told me I should go down and see Mr. Richards—me and Mr. Ross should go down and see Mr. Richards in Lynn.

20. *Int.* For what purpose?

Ans. To explain the machine to him.

21. *Int.* And did you go down to see Mr. Richards?

Ans. We did.

22. *Int.* How soon after you had this conference with Mr. Willson?

Ans. I believe a day or so.

23. *Int.* Whom did you meet there?

Ans. To make it sure we took another man along there that worked on the machine.

24. *Int.* Who was that?

Ans. J. Tobin.

25. *Int.* You say you had first tried to explain to Mr. Willson?

Ans. Yes. I tried to explain it, and Mr. Willson could not understand it.

26. *Int.* Then you took down Mr. Tobin?

Ans. To Mr. Richards in Lynn.

27. *Int.* Did you use the machine then for the purpose of explaining the difference?

Ans. I believe he took us over to P. J. Harney's shop, I believe it was, and showed us a No. 5 machine up there and showed us the old Ideal machine, I believe, and explained the difference between those machines there.

28 *Int.* Who explained the difference?

Ans. I tried a little. Mr. Tobin tried a little.

29. *Int.* Between the Plant machine and those machines?

Ans. Yes.

30. *Int.* Now, do you know whether or not Mr. Tobin was paid for going down there that day?

Ans. Yes, sir. He got $3.

31. *Int.* Do you know who paid him the $3?

Ans. Mr. Richards paid him. Made out a receipt and he signed it.[1]

It is assuredly true that the selling efficiency of an organization is, to a considerable extent, dependent upon its knowledge of the exact state of trade and its own position in that trade with reference to competitors. In the interests of its economic efficiency, therefore, a concern would appear entitled to obtain information in regard to the business of competitors through

[1] Abram Sochat, brief for the United States, *United States* v. *United Shoe Machinery Company*, *cit. supra*, pp. 363–64, quoting record, Vol. IV, pp. 1732–33. In this connection cf. also original petition, *United States* v. *S. F. Bowser*, U.S.D.C. for the District of Indiana, p. 6.

all ordinary business channels, such as the reports of salesmen and similar methods. On the other hand, the resort to the use of spies and detectives for the purpose of tracing the business of competitors, the bribing of railway and other employees in order to secure such information are practices which should be regarded as acts of unfair competition. All the requirements of productive and selling efficiency under fair competition can be fulfilled by information obtained in the regular course of business and without resort to methods of the character described.

CHAPTER X

COERCION, THREATS, INTIMIDATION, ETC.

In the course of the competitive struggle in the business world, statements may be made, letters written, and various things done which are either openly or impliedly threatening and which are intended to intimidate and coerce. In some cases the threat is so veiled that it is necessary to examine carefully the surrounding circumstances in order to determine whether coercion or intimidation is intended or results. In other instances there is no concealment.

Broadly speaking, these methods may be said to have two possible applications. They may be used either as the complement of other unfair practices or in order to suppress and destroy competition generally. In the former case these methods occur only as an aid to other unfair practices; in the latter they have no necessary connection therewith and are used quite independently thereof.

Considering first the former use, we find, for example, that coercion, threats, and intimidation have been used:

I. To secure compliance with exclusive arrangements;

II. In support of blacklisting, boycotting, white lists, etc.
III. To obtain conformance with conditional requirements.

I

It was related by Mr. William B. Dailey that the Photographic-Supplies Combination, in an endeavor to enforce its exclusive selling arrangements discussed in chap. v, had its agents call on dealers personally in reference thereto and did not put in writing any statements which could be used against it. Thus Mr. Moreau, of the Eastman Kodak Company, visited some of the dealers in New York. The conversation which took place, as the dealers related it to Mr. Dailey, ran somewhat as follows:

> Now, Mr. So-and-so, of course you understand that we must get more money for our goods. . . . . We are giving you the full list price and we protect you and we expect you to stop handling these other men's paper. Of course, we are not making any threat; we do not say you have to do it, you understand, but you know we control cameras and films on which we have patents, and if you could not get these other goods it would be very disagreeable for you.[1]

[1] W. B. Dailey, *Report of the Industrial Commission*, etc., *cit. supra*, Vol. XIII, p. 184.

There can be little doubt that in this case we encounter a scarcely veiled threat. Considered in the light of the Kodak combination's policy of exclusive selling and the testimony of Mr. Abbott and Mr. Dailey regarding this policy,[1] the affairs can scarcely be otherwise interpreted.

In the discussion of exclusive arrangements in a preceding chapter it was pointed out that the Keystone Watch Case Company mailed a letter to the jobbing trade dated January 15, 1910, which contained, among other statements, the following clause:

> Fourth. And further, we desire that the jobbers to whom we sell our goods bearing the following trademarks, to wit, *Howard*, *Boss*, *Crescent*, *Planet*, *Crown*, *Silveroid*, and *Excelsior* shall not deal in any watch cases other than those manufactured by us.[2]

In addition, the letter also made this statement:

> Whether or not our wishes as hereinafter stated be complied with we shall from time to time exercise our right to select the jobbers to whom we shall sell our goods, and we shall, irrespective of any past dealings, *refuse to sell to those jobbers who, in our opinion, handle our goods in a manner detrimental to our interest or*

[1] Chap. v, *supra*. [2] *Ibid.*

whose dealings with us are in any other respects unsatisfactory.[1]

The implied threat to cut off dealers which was contained in this letter was reiterated personally by the representatives of the Keystone Company, as was testified to by a considerable number of jobbers. One of the most interesting bits of testimony is that of Morris Eisenstadt, of the Eisenstadt Manufacturing Company, wholesale jewelers in St. Louis:

Q. Now, will you state fully in substance, as nearly as you can, the conversation that you had with Mr. Levy[2] and with Mr. Hyatt,[3] or with either of them, at that time relating to the letter of January 15, 1910, and its substance?

A. They stated in substance that the company meant everything that was implied in that circular letter, and I says to Mr. Levy, "Mr. Levy, don't you consider that a kind of little arbitrary?" And he said, "I am not here to discuss that, but am instructed to tell you what the company is going to do." I said, "Won't you give us a little time to consider the thing, as this affects the general policy of our business, and I would like to have a little time to think it over, and I will give you an answer within ten days." And he said, "No; I have been instructed to tell you

[1] Petition, *United States* v. *Keystone Watch Case Company*, *cit. supra*, p. 14.

[2] Representing the Keystone Company.

[3] Representing the Keystone Company.

that unless you can give us your favorable answer to it we will discontinue shipment and close your account."

. . . . . .

Q. Was there any further conversation in substance than what you have stated between you and Mr. Levy?

A. Well, we talked for an hour or two, but I cannot recall exactly all that was said, but that was the substance of it. But I further said to Mr. Levy; I said, "You don't, Levy, mean to tell me that our past relations, our volume of business and friendly relations with the officers of the company are not going to cut any figure in this deal? Are you simply going to be arbitrary without any reference to our past relations?"

Q. And what did he say to that?

A. He said, "We certainly will." He said, "Those are my instructions; I have nothing to argue with you. I have simply to give you our instructions, the instructions I received from headquarters," and I said a few things that I do not want to say again. And it is not necessary to print it; it would not look well in print.

Q. What was the occasion of your saying those things?

A. I was pretty hot under the collar.

Q. And why?

A. To think that the concern would treat us that way after all these long years of friendly relations and close connections; we certainly had a great regard for them; always did.

Q. Did you make any reference to it as a "high-handed" proposition?

A. I expressed myself pretty fully in that respect.

Q. Was Mr. Hyatt present during this conversation?

A. He was.

Q. Did he take any part in it?

A. None at all; he had nothing to say.

Q. Now, what was the situation when Mr. Levy left—at what point had you reached when Mr. Levy left?

A. We had not reached any point, because I had given him no definite answer, but he told me—he said, "We will have to have your reply or we will cease shipment," and I said, "Levy, you don't mean to tell me you are going to refuse to fill the orders we have already placed?" and he said, "We certainly will"; and they did, and did not ship us anything until we had complied with the demand.

Q. Is it a fact that you received no shipment from them from the time of Mr. Levy's visit until you wired them you would come to terms, as you have stated?

A. Yes, sir.[1]

Similarly, in the suit against the New Departure Manufacturing Company it was charged that Gales P. Moore, the patent counsel of that organization, from time to time sent numerous communications to jobbers and

[1] Morris Eisenstadt, government's evidence, *United States v. Keystone Watch Case Company, cit. supra*, Vol. II, pp. 221–22.

dealers threatening them with damage suits in case they sold or attempted to sell other coaster brakes than those which were manufactured by the New Departure Company.[1]

II

At a meeting in St. Louis in 1902 the Lumber Secretaries' Bureau of Information,[2] adopted a constitution and by-laws and also a declaration of purposes from which the following quotation is taken:

> We recognize the right of the manufacturer and wholesaler to sell in whatever market, to whatever purchaser, and at whatever price they may see fit.
>
> We claim for ourselves, both individually and collectively, the right to buy of such manufacturers or wholesalers or their agents as we may prefer, and to refrain from buying of those who disregard the equities of trade to our injury and the demoralization of the retail lumber business.[3]

On its face this declaration appears to be innocent enough. When examined and considered in the light of the classification methods

[1] Petition in equity, *United States* v. *New Departure Manufacturing Company*, U.S.D.C. for the Western District of New York, p. 15.

[2] The Lumber Secretaries' Bureau of Information was an organization composed of the secretaries of various state associations of lumber dealers.

[3] Petition, *United States* v. *Hollis*, *cit. supra*, p. 44.

utilized by the lumber-trade associations and the boycotting of individuals failing to conform to the standards of ethics which these organizations laid down, its innocent character disappears and it becomes a threat to blacklist and boycott concerns which ship directly to consumers.[1]

III

In order to obviate some of the "tying" provisions in the Shoe Machinery Company's leases which manufacturers found so obnoxious, the legislature of Massachusetts in 1907 enacted a law which provided, among other things, that:

> No person, firm, corporation, or association shall insert in or make it a condition or provision of any sale or lease of any tool, implement, appliance, or machinery that the purchaser or lessee thereof shall not buy, lease, or use machinery, tools, implements [etc.], of any person, firm, corporation, or association other than such vendor or lessor; . . . .[2]

In spite of this statute the United Shoe Machinery Company continued to use practically the same contract as had previously been

[1] Cf. chap. vi, *supra*.

[2] Quoted from the law as read into the testimony in Hearings before the House Committee on the Judiciary, Trust Legislation Serial No. 2, Patent Legislation Serial No. 1, *cit. supra*, p. 72. Obviously this applies both to exclusive and to conditional arrangements.

employed. To it, however, was attached the following rider:

Any and all agreements, stipulations, provisions, and conditions hereinbefore printed in this instrument which are in violation of the provisions of chapter 469 of the acts of the General Court of Massachusetts for the year 1907, if there are any such, are hereby stricken out before execution and are not agreed to nor made a part of this contract.

Independent of and in addition to all other rights hereunder the *lessor shall have the right to terminate this lease and license at any time upon 30 days' notice in writing to the lessee.*[1]

Is not the last paragraph of this lease a veiled threat to cancel leases for all machines if any concern did that which the law was clearly intended to give it the permission to do? Is not the intent here to coerce, to compel, manufacturers to use the machines of the United Company, no matter what they had the privilege of doing under the law? Mr. Charles H. Jones, testifying in regard to the last paragraph above quoted, termed it a "joker," and "a 'joker' of a very serious nature."

It reads "Independently of and in addition." Please observe that their right to terminate upon 30

[1] Hearings before the House Committee on the Judiciary, Trust Legislation Serial No. 2, Patent Legislation Serial No. 1, *cit. supra*, p. 72. Italics are the writer's.

days' notice does not depend upon or is not in consequence of any violation on our part. It gives them the arbitrary right to terminate this lease at any time, with or without reason, upon 30 days' notice.[1]

To the extent that threats, coercion, and intimidation are used in order to effectuate other unfair arrangements, it follows that they should always be regarded as unfair. But while thus frequently used in supplementing other unfair competitive practices, the methods discussed in this section are perhaps equally if not more often employed for the purpose of suppressing and destroying competition generally. In some cases they are even found where no other unfair method of competition appears. But more commonly perhaps they are to be discovered in conjunction with other unfair practices.[2] At times these methods may be directed primarily to hampering existing competition. In other instances it may be attempted to prevent potential competitors from actually operating, or again both these objects may be sought. An illustration of the first class of cases may be taken from the trade in agricultural implements.

[1] Charles H. Jones, *ibid.*, p. 73.

[2] Though not in the sense of supplementing them, as in the case of the illustrations just discussed.

During the season of 1897 Adriance, Platt & Company marketed about 700 harrows. In the succeeding year its business increased to about 2,000 harrows and the outlook for 1899 was even more promising. Before the selling campaign of 1899, however, the Adriance, Platt Company was in receipt of a notice from the National Harrow Company[1] in which the latter organization stated that it believed the products of the former constituted an infringement of some of its patents. The Adriance, Platt Company denied the infringement and requested the Harrow Company to bring suit. The latter refused to do so, however, and asserted that it proposed in its own way to prevent the Adriance, Platt Company from building harrows. The Harrow Company thereupon proceeded to circularize the customers of the Adriance, Platt Company in various sections of the country. One of these circulars contained a picture of the Adriance, Platt harrow with this description: " 'The Buckeye,' manufactured by Adriance, Platt & Company, Poughkeepsie, N.Y., and claimed by us to be made in infringement of our patents." The circular went on to caution

[1] The National Harrow Company was not a manufacturer of harrows but was merely the owner of a number of patents which it licensed manufacturers to use under a royalty arrangement.

dealers not to purchase harrows which did not bear the license label of the Harrow Company. The circular likewise contained the following statements: "We have yet to find a harrow of recent and modern construction that does not embody one or more of our patents." "We regret that we are obliged to hold the dealers responsible, but this cannot be avoided, as in many cases the manufacturers would not be able to settle our claims."

According to the opinion in the case, these circulars were "followed up" by letters directed to the same persons and of the same general character. Extracts from two of these letters are given in the decision. One reads as follows:

> We have from time to time written you and mailed you circulars regarding your handling the Adriance, Platt & Company spring-tooth harrows, which are claimed to infringe our patents. . . . . We are in duty bound to protect our licensees, their customers, and ourselves, and shall sue all dealers who persist, after our repeated warnings, in handling infringing goods. We are constantly bringing suits wherever these dealers are found. This we shall continue to do till our rights are fully respected.

The excerpt from the second letter stated that:

> It is claimed by this company that it is impossible to construct a modern spring-tooth harrow, such as

can be sold at the present time, without infringing several of the numerous patents owned by us. We do not deem it necessary to give you further warning notice than this at this time.[1]

An equally interesting case of a similar character is that of the Vacuum Cleaner Company, which, it was charged, for some two years sent threatening letters and circulars to the customers of the Electric Renovator Manufacturing Company, which concern, it alleged, was infringing its patents. At the same time it refused to bring suit, in spite of having been requested to do so by the Renovating Company. One of the circulars thus sent out around 1910 was entitled "Warning," and read:

Our patents have been acknowledged and settlements made, suits have been withdrawn and licenses issued by us to the following concerns: McCrum-Howell Company of New York, ... Duntley Manufacturing Company of Chicago, Keller Manufacturing Company of Philadelphia. Any dealer or user buying apparatus from these firms is within his rights and will not be disturbed. All others may expect trouble until they comply with the laws and obtain proper authority from us under our patents.[2]

It is of course right and proper that a patentee give due notice of an infringement. When the

[1] 121 Fed. 827. Cf. pp. 828–29.

[2] 189 Fed. 754. Cf. pp. 756–57.

matter of infringement is in doubt, however, and the patentee while refusing to bring suit pursues a policy of threatening the actual or prospective customers of another organization, a strong presumption exists that the latter concern is not an infringer and that the allegation of infringement is not made in good faith. That threats and intimidation should under such circumstances be regarded as unfair is obvious. They should of a certainty be prevented, since they might injure or destroy the business of an efficient concern not an infringer and therefore entitled to compete.

Similarly, an organization may attempt in various ways to deter prospective competition. In the discussion of bogus independent concerns, in chap. ii, reference was made to the acquisition of the Western Glucose Company[1] by the Royal Baking Powder Company in 1908. The government has asserted that the purpose of this acquisition on the part of the Baking Powder Company was to have the acquired concern engage in the manufacture of glucose, starch, and other corn products and also to mix table syrups. The government further alleged

[1] The name was changed to American Maize Products Company after the Royal Baking Powder Company obtained control. Cf. *supra.*, chap. ii.

that the Corn Products Refining Company thereupon threatened to engage in the manufacture of baking powder, and to that end procured certain baking-powder machinery which was afterward sold to the Royal Baking Powder Company,[1] a compromise having been arrived at between the two concerns.[2]

In the study of the subject of unfair competition the writer has encountered only one instance of the intimidation of capital. Though occurring in Europe, it was the work of an American company, and it is cited as illustrative of the possibilities in this direction.

In the course of his operations as an independent cash-register manufacturer Edgar Park[3] was sent to Europe in connection with the Potin competition. Julian Potin, of Paris, controlled a French cash register company which built a register named "Frane." Park saw Potin, to whom he introduced himself as an American manufacturer of cash registers backed by a firm in London by the name of Morgan & Company, to which concern Park had his mail addressed while in Europe. He

[1] Petition, *United States* v. *Corn Products Refining Company, cit. supra*, pp. 22–23.

[2] Cf. chap. ii.

[3] For other instances of Park's activities cf. *supra*, chap. ii.

became very friendly with the Frenchman and also with the head mechanic and inventor of the Frane machine, a Mr. Fredemane. Park discussed the Potin model and the strength of the National Company. Potin had been advised that his register infringed the patents of the National, and Park submitted opinions from his patent attorneys apparently corroborating this statement from what Potin regarded as an independent source. Park reported to Heyne that Potin had great hopes of the German market for his cash register. The manager of the National's German house further informed Heyne that Stollwerck, the chocolate manufacturer of Cologne, had become interested in the sale of the French machine. He also told Heyne that he had visited Stollwerck in the effort to dissuade him from becoming concerned in the sale of the Frane register financially or otherwise but had been unsuccessful. Having reported to the Dayton office, Heyne was instructed to see Stollwerck himself and did so, accompanied by the German manager. He related the means at the disposal of the National and "the particular line of argument" which he had received from Dayton. This was "to tell them that they would lose their money as surely as other concerns who had invested

money before them." The next time that Heyne called upon Stollwerck he was told that the latter did not wish to become financially interested in the Frane register.[1]

The measures of intimidation employed by the National Cash Register Company often showed considerable ingenuity and are at all times highly interesting. Probably the most notorious scheme of this organization was the operation of the two display rooms known as the "gloom room" and the "graveyard."[2] Both appear to have been used in cases of existing competition as well as potential competition. The following testimony indicates the character of these rooms:

Q. Now, you have referred to a room known as the "gloom room"; just tell us about that "gloom room."

A. This was a room fixed up especially to show visitors and competitors and people who had models to sell.

Q. What was kept in that room?

A. Models of National cash registers from the early days up to the latest date and models of all com-

[1] Carl G. Heyne, record, *State* v. *National Cash Register Company, cit. supra*, Vol. II, pp. 948–49, 967–69.

[2] It is not entirely clear from the records in the two cash register cases whether there was one or two of these rooms. As nearly as the writer has been able to determine, however, there were two, although they may have been operated at different periods.

peting machines of any note that had been manufactured up to the present time.

Q. And was there anything on the competitive machines that were there to indicate what had become of them or how much money had been lost in them?

. . . . . .

A. There were cards.

Q. Showing what?

A. When they went in business and what it had cost them to continue in business and when they went out of business.[1]

Q. Now, Mr. Warren, were you familiar with what was known as the "graveyard" at the factory of the National Cash Register Company?

A. Yes.

Q. Just describe what that was, what it consisted of.

. . . . . .

A. It was a place where we displayed the competition machines that we had taken out from time to time.

. . . . . .

Q. And how large a room was it?

A. Well, it covered probably half the floor of the main building.

Q. About how many square feet, approximately, would you think there was in that room?

A. When it comes to feet, or anything like that—let's see—it would cover a space at least one hundred feet long by fifty feet wide; about that.

Q. How were those competitive machines arranged in the "graveyard"?

[1] J. E. Warren, record, *State* v. *National Cash Register Company, cit. supra*, Vol. I, p. 552.

A. Oh, we arranged the different makes together.

. . . . . .

Q. And how were those competitive machines labeled, if at all?

A. When they went into business and when they went out; the date; the amount of money the firms lost that tried to manufacture and market those machines.

. . . . . .

Q. About how long was the "graveyard" maintained, to your knowledge?

A. From the beginning of the first competition.

Q. And were they still maintaining it when you left in 1907?

A. Yes.[1]

Further testimony of Mr. Warren in the federal suit against John H. Patterson is indicative of the purposes of these exhibitions:

When a new concern was considering going into business, we would be glad to have them come to the factory to look over the models we had that would antedate theirs, let them see what we had there and the different models we made. It might prevent them from going into the business, save money to ourselves and them, because they might find something there that was really further advanced than what they could do, I mean the new concern going into the cash-register business. The idea was to prevent you from going into the business of manufacturing cash registers by showing what we had there, our strength, organ-

[1] J. E. Warren, *ibid.*, pp. 461–62.

ization and the line of machines we had, to try to convince you that we had something superior to what you had, and that you would only lose money by going into the business.[1]

The testimony of Lee Counselman gives some further conception of the purpose of these display rooms:

Q. What did you call this process of taking people through who were either in the cash-register business or contemplated going in?

A. Well, it was a process of education for the purpose of glooming them.

Q. Wasn't that called the glooming process?

A. That is what they wanted to accomplish, yes.

Q. State whether or not that was not a particular system of eliminating competing companies.

. . . . . .

A. It was there for two purposes; one was to show every visitor coming to the National Cash Register Company how strong we were, and how many people had gone out of the business, and the next object was to show the competitor how many people had gone in and out and how much money they had lost, and we tried to make him think the same thing.[2]

In discouraging or intimidating actual competition, besides using the "gloom room" and

[1] J. E. Warren, record, *Patterson* v. *United States*, *cit. supra*, Vol. I, p. 142.

[2] Lee Counselman, record, *State* v. *National Cash Register Company*, *cit. supra*, Vol. I, p. 586. Cf. also Counselman, record, *Patterson* v. *United States*, *cit. supra*, Vol. I, p. 401.

the "graveyard," National "knockers"[1] for their machines were sometimes shown to competing manufacturers and allegations of patent infringement or actual infringement suits called to their attention. Chalmers related some of these cases. He testified that he attempted to persuade Dr. Pierce, manufacturer of the Pierce Ideal register, to come to Dayton. Pierce being unable to do so, he arranged a meeting with him in Buffalo, to which city he took an Ideal machine and also the machine which the National was using in competition against it. At a second interview Chalmers showed the opinions of the National patent attorneys in which it was claimed that the Ideal infringed National patents. At another time the representatives of the Metropolitan Register Company were induced to come to Dayton. They were shown through the factory, historical room,[2] and inventions room,[3] and they were also shown the machines which the National could use against them in competition.

[1] This term is fully explained in chap. iii, on "Fighting Instruments."

[2] Room showing all models of the National from the first ones made down to the latest.

[3] This appears to have been the correct term for "gloom room," the latter being a slang expression.

One Theobald, and other members of the Board of Directors of the Toledo Scales and Cash Register Company, met certain National officials in New York. The latter had with them one of the Toledo machines and also one of the machines which had been built to meet it, and it was explained to the Toledo officials that the National intended to put this machine on the market at a price less than their machine brought. There were also statements to the effect that the machine which the Toledo Company was about to put on the market infringed a patent of the National's.

Rush Taggart of the Union Cash Register Company, was also invited to Dayton, taken through the historical room, and shown his own machine and the machine which the National had built to parallel it. He was told that the National intended to sell its machine for less money than his.[1]

F. C. Osborn, formerly of the Osborn Cash Register Company, testified that on his visit to Dayton—

they showed us the plant and also plans for extensions of their plant; they showed us a register which in

[1] Hugh Chalmers, record, *Patterson* v. *United States*, *cit. supra*, Vol. I, pp. 468–69, 471–74, 476–77. Cf. also Rush Taggart, *ibid.*, pp. 513–15.

appearance resembled our register very much, and also the tools for manufacturing this register, stating that they were about ready to put it upon the market at a low price; at one meeting which we had during this stay they exhibited to us in one room all of the models of the different styles of registers, and in the speeches which were made stated that with their organization and the various registers which they made, especially with the low-priced registers which they intended to put on the market, we would not be able to compete.[1]

"Confidential statements" were prepared by the National Cash Register Company against various concerns. They "contained a record of all suits, opinions of patent attorneys, and anything that appeared to be in evidence against that particular company."[2]

In the Michigan case Counselman further explained the purpose of these statements as follows:

A. Well, the object was to frighten them; those statements were gotten out to dealers and to agents

[1] F. C. Osborn, record, *State* v. *National Cash Register Company, cit. supra*, Vol. II, p. 864.

[2] Lee Counselman, record, *Patterson* v. *United States, cit. supra*, Vol. I, p. 405. Counselman also testified in the same suit that, except for the first two or three, the confidential statements were made under his supervision and that President Patterson was the one who first thought of the idea (Counselman, *ibid.*). Chalmers testified that the first of the confidential statements was prepared by Mr. Patterson, Counselman, Morse, and himself and that it was O.K.'d by Sigler as attorney before it was sent out (Hugh Chalmers, *ibid.*, Vol. I, p. 503).

and to district managers; they were gotten out for that purpose, so that it would not look as if they were gotten out for any one competitor.

Q. And were they sent out as matter for salesmen and agents?

A. No.

Q. To whom were they sent?

A. They were sent to the competitor that they were gotten up on.

Q. But apparently addressed to your agent or salesman?

A. Well, it was meant to appear that some agent mailed it in to them.[1]

One of the most troublesome competitors of the National was W. T. McGraw, who was in the cash-register business for many years under various names, manufacturing several different makes of the registers, among which were the Globe, Continental, Illinois, St. Louis, and others. Serious efforts were made by the National in 1904 to persuade McGraw to discontinue. He was invited by that organization to visit Dayton and finally did so. Upon his arrival he appears to have been "gloomed" in the orthodox manner and later went to lunch at the officers' club with Chalmers, Counselman, and others. President Patterson dropped in, and McGraw testified that

[1] Lee Counselman, record, *State* v. *National Cash Register Company*, *cit. supra*, Vol. I, p. 606.

"the general conversation was that no company could succeed against the organization of The National Cash Register Company." McGraw also related the following:

> Just about that time he[1] picked up a large water bottle; sat it [*sic*] down; and said that that represented The National Cash Register Company. He then reached around and found a little salt cellar, which was the smallest object on the table, and set it down by the water bottle. He said, "Now, that represents The National Cash Register Company; that salt cellar represents you, and we will wipe you off the face of the earth," to use his exact language.[2]

In the early days, the Bensinger Cash Register Company was one of the principal competitors of the National Cash Register Company. Mr. Bensinger, its president, was also the president of the Brunswick-Balke-Collender Company. James testified that the Bensinger people were advised that if they continued manufacturing their registers the National would go into the

[1] President Patterson.

[2] William F. McGraw, record, *Patterson* v. *United States*, *cit. supra*, Vol. I, pp. 423–25. Counselman confirmed this testimony, though he said, "I do not know about the exact words, about, 'the face of the earth' but they were to that effect" (Lee Counselman, *ibid.*, pp. 401–2). Chalmers' testimony regarding the incident was that Patterson told McGraw "that it would be just as impossible for him to succeed with The National Cash Register Company as it would be possible to make that pepper thing as big as that water bottle" (Hugh Chalmers, *ibid.*, p. 479).

billiard-table business or else would represent some billiard-table company. Mr. Bensinger and other members of his organization were acquainted with this fact through representatives of the National Company.[1]

In 1905 the Union Lock Stitch Company was developing a so-called straight-needle machine and also a curved-needle machine. Both of

[1]Henry F. James, record, *State* v. *National Cash Register Company, cit. supra*, Vol. I, pp. 52, 57–59.

The Lamson Company was an organization manufacturing cash carriers. It went into the cash-register business but still continued the manufacture of cash carriers. James testified that at a National convention it was stated that the National "had plenty of room to go into the carrier business, and if they didn't quit making cash registers, if they could not get them out of business without, would go into that" (James, *ibid.* pp. 73–74). Also in the remarks of the president of the National at the District Managers' Convention, July 22 to August 3, 1907, we find the following statement: "We will say the same thing to the adding machine people. 'You stay in your business and let the cash-register business alone.' We do not know whether or not we will go into it. But if they force us into it, we are ready to do so and will go into it with both feet, too" (Exhibit 41*b*, beginning p. C9; minutes of the District Managers' Convention, *ibid.*, pp. 201–9).

In contrast to the Bensinger case above there is nothing in the evidence, so far as the writer can discover, which shows that the statements just referred to in regard to the Lamson and adding machine companies were ever made outside the National Company itself. If not, it would seem possible to question whether they are to be regarded as either intimidating or coercive, however much they may show an intention to monopolize the business. For this reason they have been placed in a footnote.

these were being designed and produced for use in connection with the manufacture of shoes but had not at that time been placed upon the market. The following is the testimony of Mr. Merrick, president of the Union Lock Stitch Company, with reference to the conversation which he had with President Winslow of the United Shoe Machinery Company at the Hotel Touraine:

48. *Int.* Now, will you please be good enough to state the substance of the conversation that you had with Mr. Winslow at that time.

Ans. We were shown up to Mr. Winslow's room and we were greeted by Mr. Winslow with: "Well, boys, what is your proposition?" I told him that we had no proposition to make. He expressed surprise at that, saying that he understood that we had some proposition which we wished to make. I told him no, we understood that he wanted to make a proposition. There seemed to be a mistake all around. And with that Mr. Winslow began to attempt to persuade us to sell out our business.

49. *Int.* Sell out to whom?

Ans. Sell out to the United Co. We told Mr. Winslow that we did not care to sell—that the proposition was not far enough developed to talk of selling and we preferred to keep it. Mr. Winslow said: "How much money have you got?" I told him I didn't think that was pertinent—it didn't make any difference how much money we had. He said: "We will see that you never make a dollar." I told

Mr. Winslow that if that was the object for which they were in business they might succeed, but I thought it might prove expensive. He says: "Why, Merrick, you can see that we couldn't allow you to make any money." We talked along those lines for quite a while. I remember I asked him how he was going to stop us from making any money. "Well," says he, "we will build your machines." He says: "You know what we did to Parsons in Marlboro. We wanted to buy him out and he wouldn't sell, and we built his machine and you know what became of him." "Well," I said, "Mr. Winslow, unless you change your methods or change your men not in a thousand years will you build a machine that would interest me." So finally we agreed to disagree.

50. *Int.* Was that all that was said at that conference?

Ans. I remember Mr. Winslow said he sat there at the head of the table like a banker, and eventually the wheel in its rotation would stop in front of him with our business, and he would take it.[1]

Little or nothing need be said regarding acts of this character when employed generally against competitors instead of as supplementary to other unfair methods. Only one judgment can be passed upon them. They are unfair.

[1] Frank W. Merrick, brief for the United States, *United States* v. *United Shoe Machinery Company*, pp. 338–40, quoting record, Vol. III, pp. 1146–47. The substance of this testimony was confirmed by C. S. Luitwieler of the Union Lock Stitch Company, who also attended the conference. Cf. also petition, *United States* v. *Bowser*, *cit. supra*, pp. 6–7.

Their inevitable tendency as well as their purpose and intent is to prevent competition regardless of efficiency. It may be doubted if anyone will be disposed to deny that it is both necessary and desirable that they should be eliminated from American business practice.

CHAPTER XI

INTERFERENCE

The writer has used the term "interference" to designate and comprehend those practices whereby one organization either directly or indirectly molests and obstructs a competitor. The variety of ways in which this may be accomplished is almost infinite, and it is the purpose of this chapter merely to indicate a few of them.

A. An organization may, for example, interfere directly with the salesmen of an organization endeavoring to make a sale.

The St. Louis Steel Range Company is engaged in the sale of stoves throughout a considerable number of states, and its agents or salesmen, carrying samples or models, travel from the city of St. Louis into and through these states, calling upon farmers and others in their houses soliciting and securing orders. The Wrought Iron Range Company of Missouri is also engaged in the business of selling ranges, and its salesmen carry with them a full-sized stove upon a specially built wagon. It is

asserted that in or about March, 1914, the latter company inaugurated a campaign of interference against the former, attempting to prevent and to hinder the sale of the goods of the Steel Range Company. According to the allegations made to the court, the Steel Range Company's men were followed by one and sometimes two of the Wrought Iron Company's men, who in some cases were armed. Whenever the employees of the Steel Range Company attempted or undertook to converse with a farmer or other prospective purchaser, the conversation was interrupted by the employees of the Wrought Iron Company, who attempted to dissuade the customer from purchasing the St. Louis Company's goods. The Wrought Iron Company's men insisted that the St. Louis goods were worthless; that the Steel Range Company conducted a fraudulent business; that the farmer or other purchaser would be cheated; that the enamel on the ranges would scale, chip, crack, and fly off, and that the stove would never be delivered, etc. In certain cases when the employees of the Wrought Iron Company had discovered the route which an employee or employees of the St. Louis Company intended to travel the next day, they would precede such employee or employees,

call upon prospective buyers, and relate similar stories. Tactics of this character, it was alleged in the petition, had been responsible for the elimination of more than thirteen concerns from this line of business in the course of a long period of years, beginning as far back as 1888.[1]

Another example of the same sort of competition may be found in the case of a certain Spaulding, who manufactured buggies and wagons which he was accustomed to sell, through itinerant salesmen, to farmers and others in the state of Washington. A voluntary association, composed principally of persons dealing in hardware and farming implements, was organized in that state for the purpose of persuading farmers and others to limit their trade to intra-state dealers, and this association entered upon a systematic course of interference with the business of Spaulding. It employed one man and frequently two to follow each of his agents. These men stopped at the same hotels as did Spaulding's agents,

[1] Petition, *St. Louis Steel Range Company* v. *Wrought Iron Range Company*, U.S.D.C. for the Eastern District of Missouri, Eastern Division, pp. 3–7. Cf. also various other suits for similar practices brought against Wrought Iron Range Company, as follows: 78 N.Y. Supp. 1114, Sup. Ct. App. Div.; 83 S.E. 693; 86 Fed. 1010, 1011.

started when they started, and followed them all day to each prospective customer in order to interfere in the conversation and transaction. These men took no vehicles with them and usually did not offer any in competition. Their only purpose seemed to be to interfere with and prevent any sales by Spaulding's agents by means of interruptions, reflections on the character of the goods, etc.[1]

B. Another method of interference to which an organization may resort is to induce the breach of contracts, sometimes agreeing to protect violators in case of suit.

The National Cash Register Company has maintained a "competition department." This department had an active head who was assisted by a competition committee, which consisted of the president of the company, general manager, head sales manager, foreign manager, superintendent of the factory, and a few others. In addition, the competition committee had at its disposal a force of "competition salesmen," which force varied considerably in number from time to time.[2] These men were known

[1] *Emerson* v. *Spaulding*, 150 Fed. 517. The decision in this case enjoined these practices.

[2] Carl G. Heyne, record, *State* v. *National Cash Register Company*, *cit. supra*, Vol. II, pp. 908–9. Heyne testified that when he first became identified with this department there were about

by various names—"special representatives," "district instructors," "expert men," "company salesmen," "company men," and "knock-out men."[1]

> They were selected, generally, on account of their ability and long time with the company; usually old men were selected . . . . because they were more familiar with the Company's methods and understood the selling business better.[2]

Usually they were entirely distinct from the men who worked under the sales department, and they were also, as a rule, on the pay-roll of the competition department. In some instances, however, the special men did work for both the sales and competition departments, in which cases they were paid by both departments.[3]

Many of the duties and acts of special men were entirely legitimate and could not be regarded as in any sense unfair. According to Warren's testimony in the federal suit, "they

twenty-six of these men. Other testimony, however, would lead to the view that this was about a maximum and that the number was very often, if not generally, much smaller than this estimate.

[1] Lee Counselman, *ibid.*, Vol. I, p. 571; Robert Patterson, *ibid.*, Vol. III, p. 1735; Carl G. Heyne, *ibid.*, Vol. II, p. 909.

[2] Robert Patterson, *ibid.*, Vol. III, p. 1735.

[3] J. E. Warren, record, *Patterson* v. *United States*, *cit. supra*, Vol. I, pp. 126–27.

were merely expert salesmen, who went to assist the regular agents in cases of severe competition or where the regular men were experiencing difficulty in making a sale."[1] These men received special instructions on the different lines of machines and were educated as to their mechanical construction before they were put on such assigned work. They were not necessarily selected for these duties because they possessed more knowledge of the mechanism of the machines than the ordinary salesman, but because they were experts in selling and demonstrating.[2]

Notwithstanding their apparent and alleged legitimacy of purpose and character, there is a considerable amount of evidence to show definite interference with the contracts of competitors on the part of special men as well as regular salesmen. Heyne gave testimony regarding the situation during the Hallwood fight:

A. The agents of The National Cash Register Company, regular and special, were instructed to inform purchasers and users of the Hallwood registers that the registers they had purchased were defective and infringed The National Cash Register Company's pat-

[1] J. E. Warren, record, *Patterson* v. *United States*, *cit. supra*, Vol. I, pp. 157–58.

[2] *Ibid.*, pp. 164–65.

ents; and that if they were in the merchant's place they would either not accept the register, in the case of purchasers to whom the registers had not been delivered, and *in case of users*, that they would, if they were in the place of the merchant, return the register to the manufacturer without further payment.

Q. Do you know whether or not registers were returned . . . .?

A. I do not know any registers were returned, but I do know that users of Hallwood registers *refused to make further payments on their registers*, which resulted in their being sued in several cases.

Q. Do you know whether or not the National Cash Register Company employed attorneys to defend suits against purchasers of competing machines?

. . . . . .

A. They did not employ them openly, but they paid them in several cases of which I know.

Q. Do you recall any particular cases or any particular attorneys that were employed or that were paid by the National Company for that purpose?

A. I recall the name of one.

Q. Who was that?

A. A Mr. Mathias of Chicago.[1]

Warren testified regarding his work as a special man on the Hallwood competition as follows:

Q. Did you during that year call on people that had already purchased a competing machine?

A. Yes.

[1] Carl G. Heyne, record, *State* v. *National Cash Register Company*, *cit. supra*, Vol. II, pp. 1002–3. All italics are the writer's.

Q. You say that you undertook to convince them that they had bought inferior machines?

A. Yes.

Q. Why did you do that?

A. Because I wanted to sell them a National.

Q. Why did you want to sell them a National so long as they already had one of another make?

A. Because we wanted their business.

Q. And supposing that they had contracted to purchase a competing machine and hadn't paid for it yet, what would you do about that?

. . . . . .

A. Send it back anyway.

Q. What would you do about the portion of purchase price that the purchaser had already paid?

. . . . . .

A. I gave him credit for it on his purchase of the National.[1]

Q. And what would you do about the contract that he had with the other company?

. . . . . .

A. It would be left up to him in most cases.

Q. Was it in all cases?

A. No, *we protected them in some cases.*

[1] In these cases "Services to be rendered" was written on the contract. The term was explained by Counselman: "Well, if a man owned a Hallwood cash register and he had paid $50 on it, and he was sold a National cash register at $200, to keep him from losing that $50 he had paid . . . . it was considered 'Services to be Rendered' and he only had to pay $150. . . . . I never knew what the services were. It was just a certain way of giving him the benefit of $50, which he had already paid"—Lee Counselman, record, *Patterson* v. *United States*, *cit. supra*, Vol I, p. 414.

Q. State whether or not you ever did agree with the purchasers of competing machines to protect them on their contract with the competing company?

A. We did.

. . . . . .

Q. State whether or not that was with the sanction of the National Cash Register Company, your employers.

. . . . . .

A. It was at the time, that is, until we were later advised by our attorneys to stop doing it.[1]

C. The business of competitors may likewise be interfered with and much difficulty and trouble created by lawsuits. In the Michigan suit against the National Cash Register Company Robert Patterson testified that he did not recall that there was ever a cash register made which the National did not allege infringed its patents.[2] Heyne testified:

It was the established policy as laid down by the president of The National Cash Register Company, and the statement he made to me, to bring as many suits as possible against the competitors because it would financially embarrass them and their

[1] J. E. Warren, record, *State* v. *National Cash Register Company, cit. supra*, Vol. I, pp. 421–22. Cf. also petition *United States* v. *Bowser, cit. supra*, pp. 6–7, and petition, *United States* v. *Central West Publishing Company, cit. supra*, p. 14. Italics are the writer's.

[2] Robert Patterson, record, *State* v. *National Cash Register Company, cit. supra*, Vol. III, p. 1856.

stockholders and if they lost, to appeal; this policy he expressed in his public report which was sent out to stockholders in 1906; it was promiscuously sent to various people; he always expressed it.

. . . . . .

Q. State whether or not it was the policy of the National Company to bring suits against a competitor as a preliminary to buying them out or attempting to buy them out.

. . . . . .

A. Yes, because the dismissal of such a suit could always be made part consideration of the purchase price.[1]

In spite of this last testimony there is much evidence to show that all the National infringement suits were suits brought in good faith. Mr. Muzzy, of the patent department, testified:

I do not know of any instances where suits were brought without first securing the opinions of the different attorneys employed by the company in regard to such infringement; and I further do not know of any suits being brought where these opinions of the attorneys reported no infringement.[2]

However true it may have been in all cases where infringement suits were brought that it was believed that there was actual infringement, this fact would scarcely seem to justify

[1] Carl G. Heyne, record, *State* v. *National Cash Register Company, cit, supra*, Vol II, p. 936.

[2] W. H. Muzzy, *ibid.*, Vol. III, p. 2154.

the multiplicity of suits which were instituted by the National. In the case of the Hallwood and its successor companies, besides several suits brought by the National for patent infringement, a large number of suits were entered against dealers and users.[1] F. C. Osborn, at one time of the Osborn Cash Register Company, testified that the National started one suit against that company for patent infringement and about thirty-one or thirty-two suits against users. In this case the courts were asked for an injunction restraining the National from prosecuting the suits against users. The judge intimated in a statement that unless a stipulation or agreement of some sort were entered into by which a stay of proceedings would be had in the prosecution of subsidiary suits until the main suit was decided, he would be inclined to grant the injunction.[2]

There is also some testimony to the effect that the National definitely traded on the infringement suits which it brought.

Q. Do you know what its policy was relative to the commencement of suits against users of competitive

[1] *Ibid.*, p. 2155.

[2] F. C. Osborn, *ibid.*, Vol. II, pp. 862, 871–72, and also in record, *Patterson* v. *United States*, *cit. supra*, Vol. I, p. 436. Sometimes the initials of Osborn are given as F. C., at other times as F. E.

machines because of alleged infringements of patents of the National Company?

. . . . . .

A. We all received notice from the Company to state to a probable purchaser of a competing machine, or those who had already purchased competing machines, either to delay the purchase of the competing machine and put them off thereby, and also to those who had already purchased, stating that they didn't have a clear title and not to meddle with any competing machine—that there was a chance of a lawsuit.

Q. That is, that was the notice you gave to the purchaser?

A. Yes.

Q. Or an intending purchaser of a competing machine?

A. Yes.[1]

D. The United Shoe Machinery Company, or rather its agent, appears to have attempted to interfere with the operation of a competitor by fomenting a strike in his plant.

In May, 1910, Thomas G. Plant, having perfected a line of machines designed to perform all the processes in the manufacture of shoes, discontinued the use of United machines and installed the Plant machines in place of them. Frank Morrison, at that time employed in the Plant factory, testified that in June the follow-

[1] Henry F. James, record, *State* v. *National Cash Register Company, cit. supra*, Vol I, pp. 224–25.

ing conversation took place between himself and Mr. Willson of the United Shoe Machinery Company:

16. *Int.* State the conversation you had with Mr. Willson, the first conversation.

Ans. First, I seen him alone. We had some trouble in there and he said: "Why don't you go out on a strike?" He says: "We will back you." I says: "It can't be done, because we give Mr. Plant a month of time to fix the matter up with us." Then he said: "Come see me when you are through with it." The month was up and we had one meeting. The day before that somebody told Mr. Plant what was going on. Then the next morning they refused us to go in. Then we went down to see Mr. Willson, us three, Mr. Ross and Sochat and I. Then he wanted us to start an organization.

17. *Int.* State what took place between you and Mr. Willson and these other gentlemen at the second meeting. Was there any proposition made to you by Mr. Willson?

Ans. Yes. Me alone, you mean? Mr. Willson's offer was that if we organize the place and get him all the information we could for so and so machine, we turn him in how many work they do on each machine every day so and so, he will pay us $2,000 cash and pay our expenses and he will see we get a job too. That was between us three. Mr. Willson was the fourth.

. . . . . .

20. *Int.* Did you unionize the Plant factory?

Ans. Well, we tried to, but we failed later.

21. *Int.* You failed?

Ans. Later on; we didn't have no more money to use.

22. *Int.* How many members did you finally get into the union?

Ans. I think we had near 300.

23. *Int.* Three hundred?

Ans. Pretty near 300. Mr. Ross he told me it was coming up to 300. He was keeping the books.

24. *Int.* Did you make any reports to Mr. Willson about the conditions in the Plant factory?

Ans. Two or three times a week; sometimes three of us, sometimes all of us.

25. *Int.* Well, what reports did you make to Mr. Willson?

PUTNAM, J. About what?

MR. GREGG. About the conditions in the Plant factory; the progress they were making with the union.

Ans. Yes. We used to tell him we got so many members. . . . . He says: "Go ahead, keep up"—he always told us.

26. *Int.* Told you what?

Ans. Always told us to keep up organizing, do our best to get an organization in there. He says: "It will be better for you by and by."

. . . . . .

34. *Int.* How many conferences did you have with Mr. Willson in regard to this matter?

Ans. About organization?

35. *Int.* Yes.

Ans. Well, we have been there severals of times.

BROWN, J. How many times?

THE WITNESS. I couldn't tell you.

BROWN, J. To the best of your ability.

THE WITNESS. Two or three times a week for about two months' time.

BROWN, J. How many times?

THE WITNESS. We have been there about two or three times a week.

BROWN, J. For two months?

THE WITNESS. For two months.[1]

E. A highly original method of interference has also appeared in the lumber trade. This has consisted of an organized campaign of securing from lumber mail-order houses catalogues and specifications by the wholesale, thereby increasing heavily the overhead expenses of such establishments. The manner in which this campaign has been carried on is shown by the publications known as the *Black Book* and the *White Book*. The following extract from the *Black Book* illustrates the system:

It is beyond doubt that the greatest menace to the lumber business to-day is the competition of the mail-order houses, which has wrought such havoc in the ranks of the small merchants throughout the country.

. . . . . .

[1] Brief for the United States, *United States* v. *United Shoe Machinery Company*, pp. 353–56, quoting record, Vol. IV, pp. 1702 ff. The testimony of both C. G. Ross and Abram Sochat confirmed that of Morrison. Ross brought suit against the United Co. and the Willson estate to recover the amounts expended in accordance with their arrangements with Willson.

In order to successfully compete with them, it is necessary for every dealer to keep in close touch with them and know what prices they are quoting to his customers. To accomplish this, the following line of action should be *persistently*, *faithfully*, and *systematically* carried out.

GET PRICES AND CATALOGUES

Secure from Gordon Van Tine Company at least two catalogues per week, using your own name and also that of other members of your family, employees, friendly contractors, and merchants, but never use a fictitious name. By using care each name will answer for five communications.

1. Send for catalog in response to ad.
2. Send list of material for estimate.
3. Send letter asking questions requiring *special* reply, remembering that all your letters will be answered by *printed* replies if the labor of writing a special reply can be avoided.
4. Send for samples of roofing.
5. Send for paint color card.[1]

As to the effect of these campaigns, Vice-President Scott, of the Gordon–Van Tine Company, testified:

We continued to sell the consumers and were harassed by the dealers generally, and suffered a loss in money which was occasioned by the action of a

[1] Brief for the United States, *United States* v. *Hollis*, *cit. supra*, p. 69, quoting record, Vol. VIII, Exhibit 162, p. 1. Italics those of brief.

campaign which was instituted and carried on by the lumber dealers in general. This campaign consisted of a *general organized effort* on the part of the dealers to get our catalogues by the wholesale. They were expensive; it cost money to mail them. They were counterfeit or phony requests which increased our overhead cost, increased our clerical cost and mail cost, and in 1907 it cost us fully $25,000.[1]

The testimony of Thompson, manager of the building-material department of Montgomery Ward & Company, as to the effect of this scheme is of a similar nature:

> We were interfered with by what I would call fake estimates, increasing the expense of our estimating department. The building material department was *flooded* with these estimates. This practice was pursued during the years 1908, 1909, and 1910.[2]

That the direct interference with the salesmen of a competitor, as has been illustrated in this chapter, is unfair, it requires no argument to prove. It is absolutely opposed to a competition of productive and/or selling efficiency. Nor is deliberate interference with the contracts of competitors any less unsound economically.

[1] Brief for United States, *United States* v. *Hollis*, *cit. supra*, p. 70, quoting pet. tes., Vol. II, pp. 10–11, appendix to brief, p. 94. Italics those of brief.

[2] Brief, *ibid.*, pp. 70–71, quoting pet. tes., Vol. II, pp. 317–18, appendix to brief, p. 142. Italics those of brief.

An interference with the business of competitors through harassing lawsuits stands on the same basis as interference with contracts or with competing salesmen. As Judge Quarles well stated in an injunction proceeding growing out of a multiplicity of suits a patentee may:

> bring a multiplicity of suits for the purpose of harassing and annoying a rival manufacturer, for the purpose of subjecting him to burdensome expense, and to destroy his business by exciting terror among his customers. . . . . Instances are not wanting where patentees make illicit use of the courts as instrumentalities of oppression; bring a multiplicity of suits, purposely scattered through the circuits, not for the honest purpose of securing an adjudication in support of the patent, but to crush a rival manufacturer by creating a stampede among his customers; alarming them by circulars breathing threats of prosecution, denouncing the product of the rival concern as an infringing device . . . . .[1]

A similar sort of judgment must be passed upon such interferences[2] as those testified to in

[1] District Judge Quarles in *Commerical Acetylene Gas Company* v. *Avery Portable Lamp Company*, 152 Fed. 642.

[2] It is probably unnecessary to add that numerous other analogous practices may be used. Some of such other methods are alleged in the case of *United States* v. *Bowser* (original petition, U.S.D.C. for the District of Indiana, pp. 5–7). S. F. Bowser & Company are engaged, in common with some twenty-five or thirty other organizations, in the manufacture of underground storage outfits for the safe storage and handling of gasoline and similar inflammable liquids. The great increase in

the Shoe Machinery case and related in the illustration from the lumber trade.

the number of motor-driven vehicles has in many cases resulted in cities and towns requiring proper storage facilities for imflammable liquids in order that property and life may be properly safeguarded.

The ordinary type of underground storage outfit consists of a steel tank placed underground and a pump connected thereto to raise the contents. Certain other outfits of a similar character are also manufactured.

Among other things the government charged the Bowser Company with:

"1. Making and causing to be made to customers and prospective customers of competition, [*sic*] and other persons, false representations concerning the standing, financial and otherwise, of said competitors, the quality of the pumps, tanks and outfits manufactured by them, and the ability of such pumps, tanks and outfits to meet the requirements of the National Board of Fire Underwriters.

. . . . . .

"3. Bribing or employing architects, fire marshals, insurance agents, or municipal officers and other persons to use their influence . . . . in preventing the sale of the products of competitors.

"4. Preparing and furnishing to and urging the adoption by municipalities of certain forms of ordinances respecting the storage or handling of inflammable liquids, wherein the use of the pumps, tanks and outfits manufactured by competitors was prohibited, or the sale thereof interfered with.

. . . . . .

"10. Inducing and hiring salesmen, agents and employees of competitors to leave their employment and enter the employment of the defendants."

Three of these practices, 1, 3, and 10, were enjoined in the consent decree of the court. Disparagement and misrepresentation have not been dealt with by the writer. For discussions of these cases cf. *Report of Commissioner of Corporations, Trust Laws, and Unfair Competition*, chap. vii.

CHAPTER XII

MANIPULATION

The word "manipulation" has been used to indicate certain practices and methods which cannot be satisfactorily defined and which do not lend themselves to inclusion under any of the classes already discussed.

It was asserted that when the Naval Stores Export Company began business and had accumulated a considerable quantity of resin and spirits of turpentine, the formerly existing Naval Stores Combination inaugurated a fierce trade warfare against it. At the time much of the stock of naval stores belonging to the Export Company was hypothecated with the banks. By manipulation the Naval Stores Combination then caused the Savannah market for turpentine to decline some 30 per cent within a period of two weeks. The Export Company was requested to furnish additional margins. As it was unable to do so, it was forced to sell out its accumulated supplies at losses which nearly exhausted its capital stock.[1]

[1] Petition in equity, *United States* v. *American Naval Stores Company*, U.S.D.C. for the Eastern Division of the Southern District of Georgia, pp. 11–12.

The case of the Pennsylvania Sugar Refining Company is familiar to many. Some years ago Adolph Segal began the construction of a sugar refinery in the city of Philadelphia. During the process of construction, and while Mr. Segal was hard pressed for cash, he was offered a loan by one Gustav E. Kissel, a broker for an undisclosed principal. The offer was accepted and, in return for the loan, a majority of the stock of the refinery company and all its bonds were deposited with Kissel. At the same time written authority was given him to exercise the voting power of the stock.[1] The undisclosed principal was in fact the American Sugar Refining Company, and a few days after these arrangements were completed, Kissel attended a meeting of the board of directors of the Pennsylvania Refining Company, causing four of the seven directors to resign and himself and three others subject to his control to be elected to fill the vacancies. The majority of the board then adopted and spread upon the minutes of the company the following declaration: "*Resolved*, That the refinery do not run and that no proceeding looking to the beginning

[1] Cf. agreement between Segal and Kissel, December 30, 1903, Exhibit L, petition, *United States* v. *American Sugar Refining Company*, *cit. supra*, pp. 213 ff.

of operation be taken until the further order of the Board."[1]

It has also been charged that the Aluminum Company of America delayed the forwarding of bills of lading and abruptly ceased shipping aluminum metal to concerns competing in the manufacture of aluminum-finished goods without giving any warning of its intention. In this way independents were hampered and prevented from filling their orders.[2]

[1] Quoted from resolution cited in petition, *United States* v. *American Sugar Refining Company, cit. supra*, p. 87. Cf. for further details, *Hearings on the Investigation of the American Sugar Refining Company*, 62d Cong. 1st sess., 1910–11, Vol. II, pp. 1276–85.

[2] Petition, *United States* v. *Aluminum Company of America, cit. supra*, p. 23. The Aluminum Company was in the position to do this because of its large control of bauxite fields discussed in chap viii.

CHAPTER XIII

CONCLUSION

This study with its twelvefold classification by no means pretends to comprehend all of the unfair methods which have been and are being employed by various organizations. It has endeavored merely to illustrate and explain a number of these methods and to indicate some of the reasons for regarding them as uneconomic and hence as unfair. Such a review naturally renders pertinent some consideration of the relation of these methods to the trust problem in the United States.

Many reasons have been advanced to account for the phenomenon of trust development. Among these explanations one of the most generally accepted is that which may be termed the competition theory of monopoly. This theory holds, in brief, that the normal and possibly inevitable economic tendency of competitive business is the creation of monopoly. The development of large-scale production with its attendant advantages necessarily creates larger and larger business units. These

units are capable of supplying a proportionately larger number of consumers. Sooner or later they come into conflict with one another; intense competition ensues, and in consequence the margin of profit rapidly narrows. Each competing concern strives by increasing its scale of production to effect substantial economies and reductions in unit costs, thus enabling it to sell its increasing volume of output at a lower and lower price, compensating itself for the ever-narrowing margin of profit per unit by an ever-increasing volume of sales. The advocates of this theory assert that under these circumstances one of two results becomes inevitable: either these competing concerns will combine or else marginal concerns will be eliminated until a monopolistic condition ensues. In either event the outcome is the same —monopoly.

This theory has been enunciated by several writers and is set forth by the German authority, Professor Liefmann, as follows:

> The conceivable maximum satisfaction of wants will be reached when, in each branch of industry, the cheapest sellers supply the total demand. To bring this about is, after all, a final aim of free competition. It enables new enterprises to be established as soon as someone believes that he can sell cheaper than at least a part of the sellers then in the market.

But since as a rule, a single seller is the cheapest, or only a very few, who under competition secure differential gains, i.e., enterpriser's profits, *competition has the tendency, when pushed to its limit, to destroy itself and to be turned into monopoly.* Since the cheapest seller can often lower costs by producing the whole supply, it follows that the maximum satisfaction of wants is obtained when there is only one seller, *competition remaining latent in the background, effective only when the seller does not employ the most efficient methods of production, or when as a monopolist* he appropriates a profit much above the economic marginal return.[1]

In Professor Liefmann's statement of the competition theory of monopoly two things are at once apparent. In the first place, it takes no cognizance of unfair competition. It presupposes fair competition, i.e., that competition is conducted upon the basis of efficiency, the business being obtained by the cheapest seller or sellers. Secondly, Professor Liefmann expressly admits that the competition theory represents only a tendency.

In regard to the first point, the belief may be expressed that this study has demonstrated that it is most fallacious to assume that business in the United States has been conducted upon

[1] Robert Liefmann, "Monopoly or Competition as the Basis of a Government Trust Policy," *Quarterly Journal of Economics*, XXIX (February, 1915), 314–15. Italics are those of the writer.

a basis of fair competition. If anything, the contrary has been the case in a large proportion of instances. In attempting, therefore, to deal with trusts and monopolies in the United States, the problem differs from what it might be were unfair methods absent. As it is, unfair competition in this country has so beclouded the issue between fair competition on the one hand and monopoly on the other that it is practically impossible today to determine to what extent monopolies and trusts are logical and necessary results of the competition theory. We have no means of ascertaining at the present time to what extent large monopolistic units or organizations are due to superior productive and selling efficiency and to what extent they may have been the result of unfair practices. In many cases competition has not had the opportunity to operate freely in industries in which such organizations exist, and the frequent prevalence of unfair methods in these industries suggests such practices as one of the important causes of the development and continuance of monopolistic concerns. In numerous individual instances the more extensive the development or the employment of these methods the more comprehensive and absolute the monopoly. The National Cash Register

Company and the dissolved Oil, Tobacco, and Powder trusts are admirable illustrations of this statement.

From the point of view of the believers in the competition theory of monopoly we should perhaps be no nearer to controlling trusts and monopolies by eliminating these unfair methods, since the result would be merely fair competition with gradual elimination until a monopolistic condition resulted. Despite this view of the matter there are reasons for believing that, without the use of unfair methods of competition, it would be extraordinarily difficult to erect a monopoly. Further, assuming that a monopolistic organization is already in existence, there are similar and equally important reasons for believing that it cannot for any considerable length of time maintain its predominant position without the use of such methods. Let us briefly examine the grounds for such a view.

According to the theory which is under discussion, the *inevitable* monopoly may occur through either combination or elimination. Considering first the matter of combination, it is scarcely to be believed that public policy in the United States will countenance, either at the present time or in the immediate future, the

formation *of any consolidation* which would thereby obtain a monopolistic position in any field of industry. If monopolistic *combinations* are not permitted, it is clear that a monopolistic position cannot in the future, as in the past, be attained through consolidation. Assuming, therefore, that monopoly does appear in an industry, it must in the absence of unfair methods occur through the elimination of competitors instead of by way of combination and consolidation. In other words, if monopolistic consolidation is prevented and unfair methods of competition eliminated, a monopolistic position can result only from superior efficiency in a field of industry for a sufficient period of years to enable an organization to obtain predominance by eliminating its competitors. But there is nothing necessarily continuous in efficiency; rather, the contrary. Managements change and the men within the management. The efficiency of organizations fluctuates from period to period with these changes and with alterations in production,[1] selling, and other methods. It is possible, therefore, to doubt that a given organization can remain the most efficient for a period of sufficient length to

[1] Cf., for example, the case of the Artura Photographic Paper Company related *supra*, chap. vi.

enable it to attain its ascendancy solely through elimination.

But this is only one side of the question under consideration. Assuming that it is possible for an organization to attain a monopolistic position in the fashion just described, or considering an organization now possessed of predominant strength, what surety is there that this situation will continue? To retain its ascendancy such an organization must (again in the absence of unfair methods of competition) continue to rely upon its efficiency. If it does not lose ground, its efficiency must remain continuously equal or superior to that of competitors existing in or entering the field.[1]

Both the Steel Corporation and the International Harvester Company supply some suggestive evidence as to the possibilities of maintaining a monopolistic position. In the preparation of an earlier study on this subject the writer searched the history of the Steel

[1] Some qualification of these points should probably be made. There may be and perhaps often are other factors than those of purely productive and selling efficiency which tend to maintain the predominance of a monopolistic organization, such as the momentum of established reputation, large capital, etc. At the same time it is believed that these factors are essentially subordinate to productive and selling efficiency and not of sufficient importance in and of themselves either to obtain or retain monopolistic predominance for an organization.

Corporation in vain for instances of unfair competition. His original conclusion, that this organization had used no such methods,[1] has since been confirmed by the decision of the lower court in the dissolution suit against that corporation.[2] It therefore appears possible to say with authority that the competition of the Steel Corporation has been fair. Yet this organization has lost ground relatively in comparison with its competitors. We find it to be true, quoting the decision in the lower court in the steel suit, "that while the proofs show a very material

[1] *Political Science Quarterly*, XXIX, (September, 1914), 488.

[2] The following statement may be quoted from the opinion of Judge Buffington: "And it may be accepted as a fact that where no competitor complains, and much more so where they unite in testifying . . . . that the business conduct of the Steel Corporation has been fair, we can rest assured there has been neither monopoly nor restraint. Indeed, the significant fact should be noted that no such testimony of acts of oppression is found in this record as was given by the competitors of the Tobacco or Standard companies in the suits against those companies. We have carefully examined all the evidence given by the competitors of the Steel Corporation. We have read the testimony of customers who purchased both from it and from its competitors. Its length precludes its recital here, but we may say its volume, its wide range of location from which such witnesses came, and their evidently substantial character in their several communities, make an inevitable conclusion that the field . . . . is as open to and is being as fully filled by the competitors of the Steel Corporation as it is by that company."—Opinions, *United States* v. *United States Steel Corporation et al.*, U.S.D.C. for the District of New Jersey, p. 22.

increase of forty-odd per cent in the Steel Corporation's business from 1901 to 1911, yet this very substantial increased percentage of the Steel Corporation's own business was less than that made by each of eight of its great competitors:

Company	Increase of Production from	Percentage of Increase
Bethlehem Steel Co.	1901 to 1913	3,779.7
Indian* Steel Co.	1901 to 1913	1,495.9
La Belle	1901 to 1913	463.4
Jones & Laughlin	1901 to 1912	206.7
Cambria Steel Co.	1901 to 1913	155.5
Colorado Co.	1901 to 1912	152.8
Republic Iron and Steel	1901 to 1912	90.8
Lackawanna Steel	1901 to 1911	63.2"[1]

*Probably Indiana Steel.

"Whereas at its organization in 1901 the Corporation may be fairly said to have controlled about 60 per cent of the entire crude steel and finished steel business of the country, at the close of 1910 its percentage was not much over 50 per cent."[2] This represents a decline of about 16 per cent in the proportion

[1] Opinions, *United States* v. *United States Steel Corporation et al., cit. supra*, p. 11.

[2] *Report of the Commissioner of Corporations on the Steel Industry*, Part I, p. 373. For further information in regard to the relative proportion in the steel industry which is occupied by the Steel Corporation consult *ibid.*, chap. ix, pp. 359–77, and opinions, *United States v. United States Steel Corporation et al., cit. supra*, pp. 8–14.

of control in the period of a few years. Moreover, it took place in spite of the acquisition by the Steel Corporation of the Tennessee Coal, Iron and Railroad Company and several other concerns. Had it not been for these acquisitions, the relative decline must have been considerably greater. These facts are worth noting as an indication of the efficiency of competition when artificial and uneconomic restrictions are removed.

The International Harvester Company supplies a somewhat similar example. Though it appears that the Harvester Company has not been entirely guiltless of unfair methods of competition, it has not been especially conspicuous therefor. Moreover, it is also true that in more recent years, since about 1906 or 1907, extremely few, if any, instances of such practices mark the history of this organization. The principal harvester lines are binders, mowers, and rakes. In each of these three lines the Harvester Company asserts that it has lost ground in relative total output. In 1903 it controlled the following percentages of the total business of the United States: binders, 98.15 per cent; mowers, 92.05 per cent; rakes, 84.90 per cent. These percentages of control have, it is claimed, declined to the following:

binders, 85.04 per cent in 1912; mowers, 72.98 per cent in 1912; rakes, 67.79 per cent in 1911.[1] If these figures are correct, the Harvester Company in a period of less than a decade has lost approximately the following percentages of the total business in these lines: binders, 13 per cent; mowers, 20 per cent; rakes, 20 per cent.

Moreover, it should not be forgotten that it is doubtful whether the competition theory of monopoly represents anything more than a tendency.[2] Assuming that consolidation is not permitted and that unfair methods of competition are prevented, it may be questioned whether the results of competition will ever extend to the point of actual monopoly.[3] To accept the theory that monopoly would result under these two conditions would seem also an acceptance of the doctrine of continuously greater efficiency on the part of the monopolistic organization. If this latter theory is correct, it would appear to follow that the ordinary business monopoly is in fact a natural monopoly. If it is incorrect, the theory represents at best

[1] Statement, brief, and argument for defendants, *United States* v. *International Harvester Company*, *cit. supra*, p. 189.

[2] Cf. Liefmann's statement of the theory, *supra*, p. 219.

[3] Though perhaps occasionally one concern or another might occupy a very strong position.

a tendency, and there is a counteracting if not equal tendency in the opposite direction.

In order that it may obtain and later retain its predominant position, an organization must, as indicated, maintain an efficiency continuously equal to or greater than that of other organizations. The moment there is the slightest decline in efficiency there is a tendency for existing competition to forge ahead or for latent competition to become actual and effective. Unless, therefore, we are prepared to accept the doctrine of continuous efficiency, we are faced by the fact that the tendency of monopoly is to breed competition and that this tendency more or less completely offsets any tendency of fair competition to be turned into monopoly.

Is there any sound economic reason why industrial society cannot exist on a competitive basis under the operation of these two forces? Will not the elimination of unfair methods of competition and the continuation of the policy of preventing consolidation bring about this result? If efficiency is not continuous, there would seem to be no good reason for believing that industry cannot continue indefinitely on this basis in a state of more or less unstable equilibrium in which the waxing and waning

efficiency of various organizations serves at once to control and prevent great monopolies and to preserve to society the benefits of competition.

From the standpoint of society it is probably immaterial whether the goods produced for the satisfaction of its wants are the product of a monopolistic or a competitive system. Other things being equal, society is interested only in seeing that they are produced by that form of industrial organization which is the most efficient. As to whether monopoly or competition is that form of organization, we have so far had practically no means of determining, though the reports of the Commissioner of Corporations on the Harvester Company and the tobacco industry[1] contain some interesting information regarding this question. From another standpoint, therefore, it becomes of fundamental importance that unfair practices should be eliminated—in order that we may have the opportunity to observe the effects of free and fair competition upon business. Only when competition is freed from the uneconomic restraints to which it has been subjected, and not before, will it become possible really to test its social value. If under these circumstances

[1] Part III of the latter.

monopolies thrive and develop, this should be good evidence of the failure of competition and the efficiency of monopolistic industrial organization. It will then perhaps be time to reject once and for all the theory of competition, adopt monopoly, and so regulate it as to insure that society will reap the benefits of its superior efficiency. But only by eliminating unfair methods of competition will it be possible to arrive at any basis for a decree in the case of competitive organization versus monopolistic organization.

In order to do away with methods of the character discussed in this volume, the Trade Commission Act has declared unlawful unfair methods of competition, while sections 2 and 3 of the Clayton Act have specifically prohibited[1] price discriminations and exclusive and tying arrangements "*where the effect . . . . may be to substantially lessen competition or tend to create a monopoly.*"[2]

The mechanism provided for eliminating the practices thus declared unlawful appears well adapted for the purpose. Whenever the Commission has reason to believe that there is a

[1] With certain enumerated exceptions.

[2] Italics are the writer's.

violation of these sections,[1] it issues and serves a complaint in which the charges are stated and a notice is given of a hearing at least thirty days after service. The party complained against has the right to appear and show cause why an order should not be entered requiring him to desist from the violation of law charged in the complaint. Any party, upon good cause being shown, may be permitted by the Commission to intervene and appear.

If, upon hearing, the Commission is of the opinion that the method of competition in question is prohibited, or sections 2 or 3 of the Clayton Act violated, it makes a report in writing, stating its findings as to the facts, and issues an order to the party complained against, ordering him to desist from the use of the method of competition or violation of law in question. The Commission may modify or set aside its report or order at any time prior to the filing of the transcript of the record of the hearings with the Circuit Court of Appeals.

In order to enforce the order of the Commission it is provided that if it is not obeyed the Commission may apply to the Circuit

[1] And in addition, in the case of the Trade Commission Act, "and if it shall appear . . . . that a proceeding in respect thereof would be in the interest of the public."

Court of Appeals of any circuit where the method in question was used or where the offending party resides or carries on his business, at the same time filing a transcript of the record of the proceedings before it, including the testimony and the report and order. The court then takes jurisdiction, notifies the party, and has full power to enter a decree, affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to the facts are conclusive if supported by testimony. If either party applies to the court for leave to adduce additional testimony and can show that it is material, and also good reasons why it was not introduced before the Commission, then the court may direct that such additional evidence be taken before that body. The Commission may thereupon modify its findings or make new ones and again file the results with the court, together with any new evidence and with its recommendations, if any, for the modification or setting aside of the original order. The judgment and decree of the Circuit Court of Appeals is made final except that the Supreme Court may review upon *certiorari*. Moreover, the jurisdiction of the former court is made exclusive and all such proceedings are given precedence over all other

cases. Any party against whom an order is made by the Commission may obtain a review of it by making an application to the Circuit Court of Appeals to have it set aside.[1]

Now, the contention can be forcibly advanced that all unfair methods of competition fall within the scope of either the "restraint of trade" or the "monopoly" sections of the Sherman Anti-Trust Act. In other words, all acts of unfair competition are either contracts, combinations, or conspiracies in restraint of trade, or else constitute monopolization, attempts to monopolize, or combinations and conspiracies to monopolize. It is indeed true that numerous injunctions in suits brought by the government have flatly forbidden in specific cases the use of many of the practices described in this volume. Such has been true, for example, of the decrees against the American Thread,[2] Burroughs Adding Machine,[2] Keystone Watch Case, General Electric,[2] and American Coal Products,[2] companies, and also of those against the Eastern States Retail Lumber Dealers and Southern Wholesale Grocers[2] associations.

[1] Cf. section 5 of the Trade Commission Act and also W. H. S. Stevens, "The Trade Commission Act," *American Economic Review*, IV (December, 1914), 850–51.

[2] Consent decrees.

But it is to be noted that in a considerable proportion of cases these decrees have been "consent decrees" and have not been contested by the companies. In several other cases involving the Sherman Act the decisions of the courts have been far from uniform in regard to certain practices. Thus, for example, rebate provisions to enforce exclusive arrangements have been several times before the courts. In the Whitwell case the tobacco rebate plan to secure exclusive dealing, previously described,[1] was upheld under the Sherman Act. A similar view was entertained in the Greene case[2] several years earlier, and among more recent cases the deferred-rebate contracts of the Brazilian Steamship Conference were upheld by the decision in the Prince Line case.[3]

On the other hand, the same type of arrangements was emphatically condemned by the decree of the court against the Great Lakes Towing Company.[4]

These instances are perhaps sufficient to demonstrate the fact that it might have been most difficult to have prevented unfair methods of competition under the Sherman Act alone. On the other hand, it would appear that the

[1] *Supra*, chap. vii.

[2] 52 Fed. 104.

[3] 220 Fed. 230.

[4] 208 Fed. 733.

general prohibition of the Trade Act is broad enough to reach any and all methods which fail to satisfy the requirements of a fair competition.[1]

[1] It is certainly open to question as to whether anything was gained by the passage of sections 2 and 3 of the Clayton Act. There is, it is true, considerable force in the argument that, in view of the Dick decision, the Commission could not have reached exclusive and tying arrangements under section 5 (cf. W. H. S. Stevens, "The Clayton Act," *American Economic Review*, V [March, 1915], pp. 43 ff.). But this is, at least, a debatable point. At the same time it must be also admitted that it is possible so to interpret section 5 as to narrow the jurisdiction of the Commission. Such a result may occur either through the interpretation given to the procedural portion of section 5 of the Trade Act or the construction applied to that section in the light of sections 2 and 3 of the Clayton Act.

In that part of section 5 which outlines the procedure of the Commission in preventing unfair methods and which follows the general declaration that unfair methods of competition are unlawful, we find that the Commission is directed to institute proceedings whenever it "shall have reason to believe that a corporation is using an unfair method of competition and if it shall believe . . . . that a proceeding by it in respect thereof would be *in the interest of the public*." [Italics the writer's.]

In a recent treatise on the Federal Trade Commission we find the following interpretation given to this clause:

"It would therefore seem to follow that an indispensable attribute of any and every method of competition which lies within the inhibition of the Trade Law, must be a tendency, or a susceptibility of use, to restrain interstate or foreign trade unduly, or to create or perpetuate a monopoly" (Harlan and McCandless, *Federal Trade Commission*, p. 26).

Good reasons for refusing to accept any such construction may easily be given. In the first place, the words "in the interest of the public" occur in a procedural portion of section 5 and have to do only with the manner in which the Commission

Certain further points may be mentioned which favor the Commission method of dealing with unfair methods of competition.

The Trade Commission has very broad investigatory powers. In virtue of those powers it

acts. Being procedural in character, it would appear that it is entirely unnecessary that the Commission either allege or attempt to prove that there is or is not public interest, on the theory that this is not a justiciable question. In other words, if the Commission decides to proceed, that action is conclusive as to the existence of public interest, whereas, if it decides not to proceed, such a determination is equally as conclusive, either as to the non-existence of a reason to believe that an unfair method is being used or that a proceeding would be in the interest of the public. Were the phrase under discussion not in the procedural portion of section 5, perhaps an entirely different view might logically be taken. As the act stands, however, it is believed that there is no necessity for the meaning of the words "in the interest of the public" to become the subject of construction except within the Commission itself, and that, once the Commission has decided to issue or not to issue a complaint, the matter is irrevocably settled so far as the phrase in question is concerned.

Such being the case, it is gravely to be doubted that the Commission in considering unfair methods of competition will be bound by any such narrow construction of the phrase "in the interest of the public" as that laid down by Harlan and McCandless. Presumably the Commission will be governed by economic and not legal considerations. As the writer has endeavored to indicate, "*the interest of the public*" *lies in securing the best goods at the lowest prices or, translated into other terms, in a competition of productive and/or selling efficiency.* In other words, the power given to the Trade Commission under section 5 is the power to prevent those methods which do not constitute a competition of productive and/or selling efficiency. This is an economic rather than a legal test, and it is submitted that it is the most comprehensive one that can be applied. The determination of

can proceed to investigate informally, compelling the production of records, etc., to an extent impossible, judicially, except with all publicity incident to a suit at law and possible damage resulting therefrom, if the charges are not

the fairness or unfairness of a given method should be made from this standpoint, and if it is, it seems clear that the words "in the interest of the public" are mere surplusage, since a competition of productive and selling efficiency is, in the last analysis, practically synonomous with the public interest.

Under the restraint-of-trade and monopoly interpretation of section 5 it is not impossible that practices would not be reached which, undoubtedly, must be regarded as unfair under the productive and/or selling efficiency construction. In addition, the attempt to apply a restraint-of-trade and monopoly test to section 5 would be to run the grave risk that certain methods might be declared lawful if used by a small concern against a monopolistic organization though unfair when used by a predominant corporation against a small concern. This is a contradictory and economically unsound proposition. A large, even monopolistic, organization is, under section 5, as much entitled to protection against unfair competitive methods on the part of the small concern as is the latter against such methods when used by the former. Whether the large organization can and will always obtain it under the restraint-of-trade and monopoly test would seem at least debatable. Probably we may concede that the courts would, in the majority of cases, take an economically correct position in this matter. At the same time the divergence of court opinions on certain methods, previously referred to, leads to the conclusion that such might not always be the case, and this constitutes a sound reason for the rejection of any restraint-of-trade and monopoly interpretation.

In a somewhat similar fashion the attempt is made to narrow the operation of section 5 of the Trade Act by construing it in the light of sections 2 and 3 of the Clayton Act. As already indicated, section 5 declares unlawful unfair methods of competition

sustained. The Commission can conduct an examination of methods of competition quietly and without undue publicity, determining whether the situation disclosed demands that a formal complaint shall be brought and open

in commerce, while sections 2 and 3 of the Clayton Act similarly declare unlawful price discriminations and exclusive and tying arrangements "where the effect . . . . may be substantially to lessen competition or tend to create a monopoly." From this last clause there is developed the following line of reasoning: "The indicia of unlawfulness common to all of the practices forbidden by sections two, three, seven and eight of the Clayton Law are the eliminating or substantial lessening of competition, the restraining of commerce, and the creating of monopoly. The same indicia *must*, it would seem, *be indispensable to a competitive trade practice before it can be held to be within the purview of the Trade Law.*" (Harlan and McCandless, *op. cit.*, p. 28; italics are the writer's.)

It is obvious that such a construction as this is economically unsound for precisely the same reasons as have just been mentioned in considering the interpretation of the clause "in the interest of the public." Not only is this true, but there are also other good reasons for rejecting any such interpretation. In the first place, it scarcely needs to be pointed out that if Congress had intended that section 5 should be so construed it would have said so. In the second place, the Clayton Act was passed after the Trade Act, and while it is by no means uncommon to use a prior act in determining the construction to be given to the terms of a later statute, it appears scarcely logical to reverse the method and to interpret a prior act by the terms of a subsequent measure. (This is believed to be true even though the supporters of such a construction may say that the two laws should be taken as integral parts of the same legislation.)

Again, it is difficult to conceive that anyone regards intercorporate stockholding and interlocking directorates—the things forbidden by sections 7 and 8 of the Clayton Act—as unfair

hearings held. In many cases, as it has already appeared, settlements will be effected informally.[1]

On the mere suggestion of the Commission many practices will probably be discontinued,

methods of competition. Such being the case, it is submitted that it is not sound logic, from either a legal or other standpoint, even to imply that the wording of these sections should determine in any way whatsoever the construction of section 5 of the Federal Trade Act.

Thirdly, section 5 does not in terms declare either price discriminations or exclusive and tying arrangements to be unfair methods of competition. Instead, it only declares unlawful unfair methods of competition generally. Similarly, neither section 2 nor section 3 of the Clayton Act contains in terms anything declaring the methods which they prohibit to be methods of unfair competition. Obviously, therefore, it is only by construing or interpreting section 5 that it is possible to assert that that section includes practices which are mentioned in sections 2 and 3. "But," say the proponents of the competition-and-monopoly construction, "it is evident from the debates that Congress considered price discriminations and exclusive and tying arrangements to be unfair methods of competition." True, but this by no means settles the question which we are discussing. The debates are merely expressions of the opinions of various individuals. The mind of Congress is to be properly interpreted only in the acts to which it gives expression in the form of measures passed and amendments and additions to those measures. Assuming that Congress really regarded the acts prohibited by sections 2 and 3 as unfair methods of competition, it should not be forgotten that neither of these sections

[1] Cf. Federal Trade Commission, *Conference Rulings, Bull. No. 1.* Cf. *Report on the Fertilizer Industry*, the arrangements made with manufacturers for the discontinuance of the use of bogus names.

the concern or concerns involved preferring to do this rather than that a formal complaint should be issued against them. In some cases it will doubtless be true that the suggestion of the Commission will cause the elimination of detrimental business practices even though the Commission might have no power under either the Trade Act or the Clayton Act to take formal

as originally passed by the House contained the phrase "where the effect may be substantially to lessen competition or tend to create a monopoly," nor words which could be similarly construed. The Senate struck out the price-discrimination section on the theory that the methods thereby prohibited were included in section 5, and passed an exclusive and tying section applying only to patented articles, not "where the effect may be," etc., but declaring *all* such conditions unlawful and null and void, as being in restraint of trade and contrary to public policy.

Until the House and Senate bills went to conference, therefore, it may be reasonably argued that, so far as Congress regarded exclusive and tying arrangements and price discriminations as unfair competition, it considered them so to be without any reference to the lessening of competition or the creation of monopoly. It may therefore be doubted that on the return of the Clayton Act from conference, with this clause incorporated in sections 2 and 3, Congress suddenly reversed its previous conclusions and decided that these methods could be unfair competition only "where the effect . . . . may be to substantially lessen competition or tend to create a monopoly." A much more reasonable construction of congressional action than this would seem to be that price discriminations and exclusive and tying arrangements are *per se* unlawful and presumably *per se* unfair as well under the conditions incorporated in sections 2 and 3 in conference. It is submitted that nothing more than this was intended. In other words, the enactment of section 5 made unlawful price discriminations and exclusive and tying arrangements in so far as

action. Much of the work of the Commission, performed quietly in this fashion, will probably never become a matter of public record so far as the names of the parties involved are concerned, but for all that it should not be overlooked that the work will have been accomplished and a free, fair, and clean competition promoted.

these may be used in such a way as to constitute unfair methods of competition. They are not *per se* unlawful, however, inasmuch as it is conceivable that any one of the three may be used in an entirely legitimate fashion. Sections 2 and 3 of the Clayton Act, however, went a step farther than section 5. In effect they declared that, without reference to the question of fairness or unfairness, price discriminations and exclusive and tying arrangements were *per se* unlawful, "where the effect may be substantially to lessen competition or tend to create a monopoly," and that under such conditions it is beyond the power either of the Commission or of the courts to find in favor of such methods. Under section 5 the Commission and the courts may find either for or against any one of these three methods, depending on the manner in which the said method is used. Under sections 2 and 3 they must always find against any one of them where the effect . . . . may be to substantially lessen competition or tend to create a monopoly.

Against such an interpretation there may perhaps be urged, from the legal standpoint, two common-law rules of statutory construction: (*a*) that where two statutes relate to the same subject-matter, the subsequent one in point of time works a *pro tanto* repeal of the prior law; (*b*) that where two statutes relate to the same subject-matter and one is general and the other specific and enumerative, the latter controls. In reply, however, it may be pointed out that there is also a third rule of statutory construction, that where two laws are in apparent conflict the court should so construe them as to give full effect to each so far

Presumably a great portion of the time of the Commission will be devoted to the prevention of unfair methods of competition. That body has at its command a large force of experts, including the very competent staff of the old

as not inconsistent with the other. Section 5 of the Trade Act is both the prior and the general law. Sections 2 and 3 of the Clayton Act are subsequent and specific, and the methods they prohibit are unlawful only "*where the effect . . . . may be to substantially lessen competition or tend to create a monopoly.*" (Italics are the writer's.)

Since section 5 does not contain this qualifying clause, it should follow that section 5 can be repealed or controlled by sections 2 and 3, under the first two rules of statutory construction which have been mentioned, only to the extent that price discriminations and exclusive and tying arrangements (the things forbidden by sections 2 and 3) operate in such a manner that the "effect . . . . may be to substantially lessen competition or tend to create a monopoly," and that as to all other discriminations and exclusive and tying arrangements section 5 remains in full force and effect.

In the opinion of the writer, therefore, sections 2 and 3 do not in reality limit the scope of section 5, but merely take from the courts and the Commission the power to find lawful these three specific methods "where the effect . . . . may be to substantially lessen competition or tend to create a monopoly"—nothing more.

This interpretation, which has, it is submitted, a reasonably sound basis, gives the widest possible construction to the authority of the Commission. Under such an interpretation the Commission would apparently have the power to proceed against price discriminations and exclusive and tying arrangements under section 5 in those cases where such arrangements were being unfairly used, but when it might be practically impossible to show that the effect might be either to substantially lessen competition or tend to create a monopoly.

Bureau of Corporations, which the Trade Law provided that it should take over. Its constant study of economic and business conditions, assisted by its large economic and legal research staff, should develop a knowledge of competitive conditions impossible for any court to acquire. Decisions will be based primarily upon economic considerations and, regardless of whether cases are settled informally or by the issuance of formal complaints, much more rapid and efficacious results ought to be obtained than could be secured through the medium of the courts alone. At the same time in the case of formal complaints the Circuit Court of Appeals may, by its decree, alter or modify the orders of the Commission upon application. This will prevent injustice, while the power given the Commission to make orders ought logically to result in developing an economic rather than a legal view of unfair competition.

Bearing all these points in mind, it is difficult to accept the view of some that the new functions conferred upon the Trade Commission could have been more satisfactorily performed by the Department of Justice and the courts than by the Trade Commission.[1]

[1] *Daily Cong. Rec.*, 64th Cong., 1st sess., Vol. LIII, p. 11566.

Until unfair competition is eliminated it is doubtful whether the trust problem will be solved. The legislation of the Wilson administration has attempted to destroy unfair practices, and an apparently good method has been provided for so doing. It is to be hoped, and indeed to be expected, that the results will be important and that the attempt made to prevent unfair competition will prove a forward step on the road to the ultimate solution of the trust problem.

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